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RECORD, CASE No. 13,627.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~409~~. 81

JOHN C. STREETER, PLAINTIFF IN ERROR,

vs.

THE JEFFERSON COUNTY NATIONAL BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 5, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 10, 1892.

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a STATE OF NEW YORK:

In Court of Appeals.

THE JEFFERSON COUNTY NATIONAL BANK, Respondent,
against
JOHN C. STREETER, Appellant.

Case on appeal.

O'Brien, Emerson & Ward, appellant's attorneys, Watertown, N. Y.; John Lansing, respondent's attorney, Watertown, N. Y.

b Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the seventh day of June, in the year of our Lord one thousand eight hundred and eighty-seven, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding.
E. O. PERRIN, *Clerk.*

Remittitur, June 8th, 1887.

THE JEFFERSON COUNTY NAT. BANK, Respondent,
ag'st
JOHN C. STREETER, Appellant.

Be it remembered that on the first day of June, in the year of our Lord one thousand eight hundred and eighty-five, John C. Streeter, the appellant in this action, came here into the court of appeals, by O'Brien, Emerson and Ward, his attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and The Jefferson County National Bank, the respondent in said action, afterwards appeared in said court of appeals, by
c John Lansing, its attorney; which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. D. O'Brien, of counsel for the appellant, and by Mr. John Lansing, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect; and hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises and by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

W. H. SHANKLAND,
Deputy Clerk of the Court of Appeals of the State of New York.

d

COURT OF APPEALS,
CLERK'S OFFICE, ALBANY, *June 8th*, 1887.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] W. H. SHANKLAND,
Deputy Clerk.

e

In Court of Appeals.

STATE OF NEW YORK, }
Jefferson County Clerk's Office, } *ss:*

I, Fred. Waddingham, clerk of the county of Jefferson and of the courts of record thereof, do hereby certify that I have compared the annexed copies of notice of appeal to court of appeals and judgment-roll on affirmance of judgment in this action by the general term —, and the same are true and correct transcripts of said original notice of appeal and judgment-roll on file in my office and of the whole of said originals.

[L. S.] In witness whereof I have hereunto set my hand and the seal of said courts and county this 30th day of May, 1885.

F. WADDINGHAM, *Clerk.*

f

In Supreme Court, County of Jefferson.

THE JEFFERSON COUNTY NATIONAL BANK, Respondent,
ag'st
JOHN C. STREETER, Appellant.

GENTLEMEN: Please take notice that the defendant in the above-entitled action appeals to the court of appeals of the State of New York from the judgment of the supreme court herein entered in the clerk's office of the county of Jefferson on the twelfth day of May, 1885, in favor of plaintiff against the said defendant, for

$140.37, and affirming judgment of special term, and from the whole of said judgment.

Dated at Watertown, N. Y., May 28th, 1885.

Yours, &c., O'BRIEN, EMERSON & WARD,
Attorneys for the Appellant,
6½ *Washington Place, Watertown, N. Y.*

To the clerk of the county of Jefferson, and to John Lansing, Esq., attorney for respondent.

1 In Supreme Court.

STATE OF NEW YORK, *Jefferson County Clerk's Office,* } ss:

I, Fred. Waddingham, clerk of the county of Jefferson and of all the courts of record in and for said county, do hereby certify that I have compared the notice of appeal, judgment, judgment-roll, exceptions, and case and exceptions hereto annexed with the originals on file in this office, and that the same is a true and correct transcript of said originals and the whole thereof.

[L. S.] Witness my hand and seal this — day of July, 1883.

F. WADDINGHAM, *Clerk.*

In Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK
vs.
JOHN C. STREETER. } Notice of Appeal.

You will please take notice that the defendant, John C. Streeter, hereby appeals to the general term of the supreme court for the fourth judicial department from the judgment in this action entered in the Jefferson county clerk's office on the 25th day of October, 1882, in favor of plaintiff and against defendant, for the sum
2 of three thousand eight hundred and twenty-four $\frac{88}{100}$ dollars, damages, and seventy-five $\frac{1}{100}$ dollars, costs, making in all a judgment of $3,899.88, and this appeal is from every part of said judgment.

Dated October 30th, 1882.

Yours, &c., O'BRIEN & EMERSON,
Defendant's Attorneys,
6½ *Washington Place, Watertown, N. Y.*

To John Lansing, Esq., plaintiff's attorney; to F. Waddingham, Esq., county clerk.

Supreme Court, County of Jefferson.

THE JEFFERSON COUNTY NATIONAL BANK, Plaintiff,
vs.
JOHN C. STREETER, Defendant. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action

and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear and answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated this 31st day of August, 1881.

JOHN LANSING,
Plaintiff's Attorney,
No. 10½ Washington St., Watertown, N. Y.

3 In Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK *ag'st* JOHN C. STREETER. } Notice of Retainer.

SIR: We have been retained by and appear for the defendant, John C. Streeter, in this action and demand a copy of the complaint, which may be served on us at No. 6½ Washington place, Watertown, N. Y.

Dated September 2d, 1881.

O'BRIEN & EMERSON,
Attorneys for Defendant.

To John Lansing, Esq., attorney for plaintiff.

State of New York, Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK *ag'st* JOHN C. STREETER. } Jefferson County, Place of Trial.

Count No. 1.

The plaintiff, The Jefferson County National Bank, say they are an association for banking purposes, with banking powers, duly organized and doing business as such in the name aforesaid at Watertown, in said county, under and in pursuance of an act of the Congress of the United States entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," passed June 3d, 1864, and the several acts amendatory thereof and supplemental
4 thereto; that at the time of the execution of the notes hereinafter mentioned Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell were copartners and doing business as such under the firm name of H. V. Cadwell & Co.; that on the 24th day of January, in the year 1877, at the city of Watertown, in the county of Jefferson, Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, in the firm name aforesaid of H. V. Cadwell & Co., made and executed their certain promissory note in writing, bearing date on the day last aforesaid, in and by which said promissory note they promised, for value received, to pay to the order of H. V. Cadwell & Co., at the Jefferson County National Bank of Watertown, the

sum of one thousand dollars one month from the day last aforesaid, and the said Cadwells, in their firm name aforesaid of H. V. Cadwell & Co., and the defendant, John C. Streeter, thereupon then and there endorsed the said note, and the same was then and there for a valuable consideration transferred and delivered to and is now held and owned by the plaintiff.

That the said note, at the proper time, to wit, at the maturity thereof, was, as the plaintiff is informed and believes, presented for payment at the place where the same was made payable as aforesaid and payment thereof was then and there duly demanded of the proper person, which was refused, whereupon the said note was duly protested for non-payment and notice of such presentation, demand of payment, refusal to pay, and protest was then and there duly given to each of the said endorsers, and the plaintiff duly performed all the conditions necessary to fix and establish the liability of the said endorsers and each of them for the payment of the said note.

The said note has not been paid, but the defendant remains indebted thereon to the said plaintiff in the sum of one thousand dollars and interest thereon from the 27th day of February, 1877.

5 *Count No.* 2.

And the plaintiff further says for a further and second cause of action that on the 7th day of February, in the year 1877, at the city of Watertown, in the county of Jefferson, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, in their firm name aforesaid of H. V. Cadwell & Co., made and executed their certain promissory note in writing, bearing date on the day last aforesaid, in and by which said promissory note they promised, for value received, to pay to the order of H. V. Cadwell & Co., at the Jefferson County National Bank of Watertown, the sum of one thousand dollars one month from the day last aforesaid, and the said Cadwells, in their firm name aforesaid of H. V. Cadwell & Co., and the defendant, John C. Streeter, thereupon then and there endorsed the said note and the same was then and there for a valuable consideration transferred and delivered to and is now held and owned by the plaintiff.

That the said note, at the proper time, to wit, at the maturity thereof, was, as the plaintiff is informed and believes, presented for payment at the place where the same was made payable as aforesaid, and payment thereof was then and there duly demanded of the proper person, which was refused, whereupon the said note was duly protested for non-payment, and notice of such presentation, demand of payment, refusal to pay, and protest was then and there duly given to each of the said endorsers, and the plaintiff duly performed all the conditions necessary to fix and establish the liability of the said endorsers and each of them for the payment of the said note. The said note has not been paid, but the defendant remains indebted thereon to the said plaintiff in the sum of one thousand dollars and interest thereon from the 10th day of March, 1877.

and the makers of said notes, without the knowledge, consent, or participation of this defendant, unlawfully, fraudulently, and contrary to the provisions of said bankrupt law then existing, agreed that the said notes should be put into judgments against the makers thereof and the property of the makers levied upon and appropriated to the payment thereof, contrary to the provisions of said bankrupt law; that said unlawful agreement was carried out and consummated between the plaintiff and the makers of said notes, and by collusion and connivance with the makers of said notes the plaintiff, without the knowledge, consent, or participation of the defendant, obtained a judgment or judgments on said notes that was in fraud of the bankrupt law, contrary to its provisions, and intended by the plaintiff and said makers of said notes as an unlawful preference over the just claims of other creditors.

That the plaintiff, in fraud of the said bankrupt law and by collusion with the makers of said notes and intending to secure an unlawful preference under said law, procured the property of said makers to be levied upon and sold under said preferential judgments and executions issued thereon, and upon such sale a large sum of money was paid to the sheriff of Jefferson county, who then held said executions, to wit, the sum of about $10,000.

That afterwards and within two months from the entry of said preferential judgments the creditors of said makers or parties entitled to institute such proceedings duly filed a petition in the bankrupt court praying that said makers, the firm of H. V. Cadwell & Co. and the individual members thereof, be adjudged bankrupts. The prayer of said petition was granted and said firm and the members thereof were duly adjudged bankrupts and an assignee of their property and estate duly appointed, to whom all the property of said firm and the individual members was duly transferred under said bankrupt law; that afterwards the said assignee commenced suit or proceeding- in the courts of the United States under said bankrupt law against the plaintiff for the purpose of procuring a judgment or adjudication declaring said property, levy, sale, and payment to the sheriff preferential under the bankrupt law and void; that issue was joined in said action and such proceedings were thereafter had in said court that judgment was rendered in favor of said assignee and against the plaintiff, declaring and adjudging said judgments, levy, sale, and payment to the sheriff preferential, fraudulent, and void under the provisions of the said bankrupt law; that the court in said action or proceeding had jurisdiction of the parties and the subject-matter of the action, and said judgment and adjudication was duly had, rendered, and made.

That by reason of said judgment and all the facts hereinbefore stated the plaintiff was by law debarred and precluded from all right or claim against the property of the makers of said notes, and all rights and remedies on the part of the plaintiff and on the part of the defendant against the estate or property of the makers of said notes was thereby lost, and the defendant was thereby discharged from all liability to the plaintiff as endorser of said notes.

11 Wherefore the defendant demands judgment that the complaint be dismissed with costs of this action.

O'BRIEN & EMERSON,
Defendant's Attorneys, Watertown, N. Y.

JEFFERSON COUNTY, *ss:*

John C. Streeter, of said county, being duly sworn, says that he is the defendant named in the above answer; that he has heard the same read and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged on his information and belief, and as to those matters he believes it to be true.

J. C. STREETER.

Sworn, &c., before me this 21st day of September, 1881.

JAMES A. WARD,
Notary Public.

At a circuit court and special term of the supreme court held at the court-house, in the city of Watertown, in and for the county of Jefferson, on the 3d day of April, 1882.

Present: Hon. I. G. Vann, justice.

JEFFERSON CO. NAT. BANK *ag'st* JOHN C. STREETER. } No. 66. John Lansing. April 25, 1882. O'Brien & Emerson.

Trial by the court, jury waived.
Witnesses sworn:
For plaintiff, —— ——.
For defendant, —— ——.
A copy.

H. HAREFORD,
Deputy Clerk.

12 In Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK *vs.* JOHN C. STREETER. } Jefferson County Circuit, April, 1882.

A jury having been duly waived and the issues joined herein having been tried before the court without a jury, after hearing the proofs and allegations of the parties and due consideration had, the following facts are found by the court, to wit:

1. The plaintiff, The Jefferson County National Bank, is a banking association with banking powers, as alleged in the complaint.

2. At the time of the execution of the notes hereinafter mentioned Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell were copartners, doing business as such in the firm name of H. V. Cadwell & Co.

3. On the 24th day of January, 1877, at the city of Watertown,

10 Jeff. Co., N. Y., the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, in their firm name aforesaid, executed their promissory note whereby they promised to pay to the order of H. V. Cadwell & Co., at the Jefferson County National Bank of Watertown, $1,000 one month from the day last aforesaid, as alleged in the said complaint.

4. The said Cadwells in their firm name aforesaid and the defendant, John C. Streeter, as an accommodation endorser, then and there endorsed the said note, and the same was then for a valuable consideration transferred and delivered to and is now held and owned by said plaintiff, as alleged in said complaint.

13 5. Said note was at its maturity presented for payment where the same was made payable and payment thereof demanded, which was refused, whereupon the said note was duly protested for non-payment and notice of such presentation, demand of payment, refusal to pay, and protest was then and there duly given to each of said endorsers, as alleged in said complaint.

6. The said note has not been paid or any part of it, but there is unpaid thereon the sum of one thousand dollars and interest thereon from the 27th day of February, 1877, being at the date hereof the sum of $1,392.75.

7. On the 7th day of February, 1877, at the city of Watertown, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, in their firm name aforesaid, executed their promissory note whereby they promised to pay to the order of H. V. Cadwell & Co., at the Jefferson County National Bank of Watertown, one thousand dollars one month from the day last aforesaid, as alleged in the said complaint.

8. The said Cadwells, in their firm name aforesaid, and the defendant, John C. Streeter, as an accommodation endorser, then and there endorsed the said note, and the same was then and there for a valuable consideration transferred and delivered to and is now held and owned by the plaintiff, as alleged in the said complaint.

9. The said note at its maturity was duly presented for payment where the same was made payable, and payment thereof demanded, which was refused, whereupon the said note was duly protested for non-payment, and notice of such presentation, demand of payment, refusal to pay, and protest was then and there duly given to each of the said endorsers, as alleged in the said complaint.

10. The said note last aforesaid has not been paid, or any

14 part or portion thereof, but there is unpaid thereon the sum of one thousand dollars and interest thereon from the 10th day of March, 1877, being at the date hereof the sum of $1,390.80.

11. On the 12th day of February, 1877, at the city of Watertown aforesaid, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, in their firm name aforesaid, executed their promissory note whereby they promised to pay to the order of H. V. Cadwell & Co., at the Jefferson County National Bank of Watertown, $750 one month from the day last aforesaid, as alleged in the said complaint.

12. The said Cadwells, in their firm name aforesaid, and the defendant, John C. Streeter, as an accommodation endorser, then and

there endorsed the same, and the same was for a valuable consideration transferred and delivered to and is now held and owned by said plaintiff, as alleged in said complaint.

13. Said note at its maturity was presented for payment where the same was made payable, and the payment thereof demanded, which was refused, whereupon the said note was duly protested for non-payment, and notice of such presentation, demand of payment, refusal to pay, and protest was then and there duly given to each of said endorsers, as alleged in the said complaint.

14. The note last aforesaid has not been paid, or any part of it, but there is unpaid thereon the sum of seven hundred and fifty dollars and interest thereon from the 15th day of March, 1877, being at the date hereof the sum of $1,041.91.

15. On or about the 16th day of March, 1877, the plaintiff brought suit on the three notes in the complaint in his action described against the said makers, Henry V. Cadwell, James S. Cadwell,
15 and Lewis A. Cadwell, in this court, and such proceedings were thereon had that the said plaintiff recovered a judgment in the said action against the said makers on the 6th day of April, 1877, for the full amount of said notes and costs, being for $2,793.90, which was duly docketed on said last-mentioned day in Jefferson county clerk's office.

16. That on the same day an execution on said last-mentioned judgment against the property of the defendants therein was issued and delivered to the sheriff of the county of Jefferson, in which said county the defendants therein then resided.

17. That the sheriff levied on said execution upon property of the said defendants therein more than sufficient in value to satisfy the said execution.

18. That on the 6th day of April, 1877, last aforesaid a petition in bankruptcy was filed in the district court of the United States for the northern district of New York against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, then residents of said district, and such proceedings were thereupon had that the said Cadwells were, on the first day of May, 1877, adjudged bankrupts, and an assignee of their property was appointed.

19. By an order duly issued out of the said bankrupts' court the said sheriff was enjoined and restrained from proceedings to sell the property levied upon under said execution.

20. Subsequently, by order of the said court of bankruptcy, the said sheriff was appointed special receiver of the estate of the said bankrupts, and was directed, as such, to sell the property levied upon and deposit the moneys arising from the sale in the depository of the said court of bankruptcy, subject to the further order of
16 the court, the lien of the said judgment creditor, if any, to follow and attach to the moneys arising from said sale.

21. The said sheriff, as such special receiver, sold the said property levied on and paid the money arising from the sale into the depository of said court.

22. The assignee of said bankrupts, in November, 1877, commenced suit in due form against the plaintiff in this action in the

Jeff. Co., N. Y., the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, in their firm name aforesaid, executed their promissory note whereby they promised to pay to the order of H. V. Cadwell & Co., at the Jefferson County National Bank of Watertown, $1,000 one month from the day last aforesaid, as alleged in the said complaint.

4. The said Cadwells in their firm name aforesaid and the defendant, John C. Streeter, as an accommodation endorser, then and there endorsed the said note, and the same was then for a valuable consideration transferred and delivered to and is now held and owned by said plaintiff, as alleged in said complaint.

13 5. Said note was at its maturity presented for payment where the same was made payable and payment thereof demanded, which was refused, whereupon the said note was duly protested for non-payment and notice of such presentation, demand of payment, refusal to pay, and protest was then and there duly given to each of said endorsers, as alleged in said complaint.

6. The said note has not been paid or any part of it, but there is unpaid thereon the sum of one thousand dollars and interest thereon from the 27th day of February, 1877, being at the date hereof the sum of $1,392.75.

7. On the 7th day of February, 1877, at the city of Watertown, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, in their firm name aforesaid, executed their promissory note whereby they promised to pay to the order of H. V. Cadwell & Co., at the Jefferson County National Bank of Watertown, one thousand dollars one month from the day last aforesaid, as alleged in the said complaint.

8. The said Cadwells, in their firm name aforesaid, and the defendant, John C. Streeter, as an accommodation endorser, then and there endorsed the said note, and the same was then and there for a valuable consideration transferred and delivered to and is now held and owned by the plaintiff, as alleged in the said complaint.

9. The said note at its maturity was duly presented for payment where the same was made payable, and payment thereof demanded, which was refused, whereupon the said note was duly protested for non-payment, and notice of such presentation, demand of payment, refusal to pay, and protest was then and there duly given to each of the said endorsers, as alleged in the said complaint.

14 10. The said note last aforesaid has not been paid, or any part or portion thereof, but there is unpaid thereon the sum of one thousand dollars and interest thereon from the 10th day of March, 1877, being at the date hereof the sum of $1,390.80.

11. On the 12th day of February, 1877, at the city of Watertown aforesaid, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, in their firm name aforesaid, executed their promissory note whereby they promised to pay to the order of H. V. Cadwell & Co., at the Jefferson County National Bank of Watertown, $750 one month from the day last aforesaid, as alleged in the said complaint.

12. The said Cadwells, in their firm name aforesaid, and the defendant, John C. Streeter, as an accommodation endorser, then and

there endorsed the same, and the same was for a valuable consideration transferred and delivered to and is now held and owned by said plaintiff, as alleged in said complaint.

13. Said note at its maturity was presented for payment where the same was made payable, and the payment thereof demanded, which was refused, whereupon the said note was duly protested for non-payment, and notice of such presentation, demand of payment, refusal to pay, and protest was then and there duly given to each of said endorsers, as alleged in the said complaint.

14. The note last aforesaid has not been paid, or any part of it, but there is unpaid thereon the sum of seven hundred and fifty dollars and interest thereon from the 15th day of March, 1877, being at the date hereof the sum of $1,041.91.

15. On or about the 16th day of March, 1877, the plaintiff brought suit on the three notes in the complaint in his action described against the said makers, Henry V. Cadwell, James S. Cadwell,
15 and Lewis A. Cadwell, in this court, and such proceedings were thereon had that the said plaintiff recovered a judgment in the said action against the said makers on the 6th day of April, 1877, for the full amount of said notes and costs, being for $2,793.90, which was duly docketed on said last-mentioned day in Jefferson county clerk's office.

16. That on the same day an execution on said last-mentioned judgment against the property of the defendants therein was issued and delivered to the sheriff of the county of Jefferson, in which said county the defendants therein then resided.

17. That the sheriff levied on said execution upon property of the said defendants therein more than sufficient in value to satisfy the said execution.

18. That on the 6th day of April, 1877, last aforesaid a petition in bankruptcy was filed in the district court of the United States for the northern district of New York against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, then residents of said district, and such proceedings were thereupon had that the said Cadwells were, on the first day of May, 1877, adjudged bankrupts, and an assignee of their property was appointed.

19. By an order duly issued out of the said bankrupts' court the said sheriff was enjoined and restrained from proceedings to sell the property levied upon under said execution.

20. Subsequently, by order of the said court of bankruptcy, the said sheriff was appointed special receiver of the estate of the said bankrupts, and was directed, as such, to sell the property levied upon and deposit the moneys arising from the sale in the depository of the said court of bankruptcy, subject to the further order of
16 the court, the lien of the said judgment creditor, if any, to follow and attach to the moneys arising from said sale.

21. The said sheriff, as such special receiver, sold the said property levied on and paid the money arising from the sale into the depository of said court.

22. The assignee of said bankrupts, in November, 1877, commenced suit in due form against the plaintiff in this action in the

said court of bankruptcy to have the judgment aforesaid recovered by said plaintiff against said makers, Cadwells, adjudged void and without legal force and effect as against the said assignee, and that all liens created by the execution issued on said judgment be vacated and set aside, and that the money deposited by such special receiver be decreed and adjudged to belong to and be paid over to said assignee.

23. The plaintiff, the said Jefferson County National Bank, appeared in said suit in the said court of bankruptcy and answered therein and defended the same.

24. The said suit in the court of bankruptcy was brought to trial on the pleadings and proofs taken therein and was tried before the judge of said court and a decree made in said suit on the 30th day of March, 1880, whereby it was adjudged and decreed that the said judgment so recovered by the plaintiff in this action against the said Cadwells on the 6th day of April, 1877, and the execution issued thereon to the sheriff of Jefferson county were void as against the assignee of said bankrupts, and that the money which arose from the said sale by such special receiver and was paid into the depository of said court of bankruptcy belonged to the said assignee of said bankrupts.

25. From which last-mentioned decree and judgment of
17 the said court of bankruptcy the plaintiff in this action appealed in due form to the circuit court of the United States for the northern district of New York, and such proceedings were thereupon had that the said decree of the said court of bankruptcy was in all things affirmed.

26. Subsequently an order was made by the said court of bankruptcy, directing the money so deposited as aforesaid to be paid to the said assignee, and it was so paid to him.

27. The plaintiff in this action never received any money arising from the sale of said property, and never realized anything from the judgment which was recovered by said plaintiff against said Cadwells on the 6th of April, 1877, or the executions issued thereon.

And the court finds and decides as matter of law—

1. That the plaintiff is not precluded from making a claim against the property of the said makers of said notes, or from proving its claim against the estate of the said makers as bankrupts.

2. That the defendant has not been discharged from liability as endorser on said notes.

3. That the plaintiff is entitled to recover of the defendant in this action the amount of said notes and interest, amounting at the date hereof to the sum of three thousand eight hundred and twenty-four dollars and eighty-four cents, for which amount judgment is ordered to be entered in favor of said plaintiff against the defendant, with costs.

Dated October 18, 1882.

IRVING G. VANN, *J. S. C.*

18 In Supreme Court, Jefferson County.

THE JEFFERSON COUNTY NATIONAL BANK, Plaintiff, *ag'st* JOHN C. STREETER, Defendant, } Judgment, October 25th, 1882, at 2 o'clock 20 m's p. m.

This action having been duly brought to trial before Hon. Irving G. Vann, justice of this court, without a jury, at a circuit court held at the court-house, in the city of Watertown, in and for the county of Jefferson, commencing on the 3d day of April, 1882, and the decision of said justice, bearing date the 18th day of October, 1882, having been duly filed, in and by which decision said justice finds and decides, among other things, that the plaintiff was entitled to recover of the defendant, at the date of said report, the sum of $3,824.84 and the costs of this action, and costs having been taxed at $75.04:

Now, on motion of John Lansing, attorney for the plaintiff, it is ordered and adjudged that the plaintiff, The Jefferson County National Bank, recover of the defendant, John C. Streeter, the sum of three thousand eight hundred and twenty-four $\frac{84}{100}$ dollars damages and seventy-five $\frac{4}{100}$ dollars costs, making in all the sum of $3,899.88, and that the plaintiff have execution therefor.

H. HAREFORD,
Deputy Clerk.

In Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK *vs.* JOHN C. STREETER.

The defendant, John C. Streeter, hereby excepts to the
19 findings and decision of the court in this action; he excepts to the findings of fact and conclusions of law separately, and specifically excepts to the following findings of fact and conclusions of law separately:

1st. To the nineteenth finding of fact and to every part thereof, and especially to so much of said finding as finds that said order was duly issued by said court.

2d. To the twenty-sixth finding of fact and to the whole thereof.

3d. To each and every finding of fact fact finding that said notes were not paid.

4th. To the first conclusion of law and to every part thereof.

5th. To the whole of the second conclusion of law and to every part thereof.

6th. To the whole of the third conclusion of law and every part thereof.

Dated October 30, 1882.

O'BRIEN & EMERSON,
Defendant's Attorneys, 6½ Washington Place, Watertown, N. Y.

To John Lansing, plaintiff's attorney.

Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK
vs.
JOHN C. STREETER.
} Case and Exceptions.

This action was brought to trial at the Jefferson circuit in April, 1882, Hon. Irving G. Vann presiding, and was tried by the court without a jury.

20 The plaintiff proved the notes described in the complaint, the protest thereof, the amount due thereon, and rested.

The defendant proved the recovery by the plaintiff of a judgment in the supreme court in its favor and against Henry V. Cadwell, Lewis A. Cadwell, and James S. Cadwell, the persons composing the firm of H. V. Cadwell & Co. and the maker of the notes described in the complaint, for $2,793.90, on the 6th day of April, 1877, which judgment was recovered upon the notes described in the complaint. The action was commenced by service on the defendants of process on the 16th day of March, 1877, and the suit and judgment was against the makers alone, impleaded with John C. Streeter, defendant in this action, but no service was made on or appearance by said John C. Streeter.

The defendant proved that the plaintiff, on the day of the entry of said judgment, procured execution to be issued upon the said judgment, in the usual and proper form, to the sheriff of the county of Jefferson, who immediately, on the same day, levied upon personal property of the defendants named in said executions more than sufficient to pay and satisfy said executions in full, with all costs and expenses.

The defendant then proved that on the 6th day of April, 1877, Daniel Crouse & Son, creditors of the firm of H. V. Cadwell & Co., filed in the district court of the United States for the northern district of New York, in which said firm of H. V. Cadwell & Co. resided and carried on business, a petition in due form, praying that said firm of H. V. Cadwell & Co. and the individual members thereof be adjudged bankrupts under the act of Congress establishing a general system of bankruptcy, then in force.

21 On the filing of said petition an order to show cause why the said firm and the members thereof, as individuals, should not be declared bankrupts was made and duly served, returnable before said district court May 1, 1877. The defendant then produced and proved the adjudication of the court declaring said H. V. Cadwell & Co. and each of them bankrupts in due form.

Also the first meeting of creditors and the election of John G. Brown as assignee. The adjudication was filed May 7, 1877, and on the 6th of June, 1877, said Brown was duly appointed assignee and all the estate, rights, property, and effects of the bankrupts duly transferred to him by M. A. Hackley, register in bankruptcy, on the 18th day of June, 1877.

The defendant then proved that on the 3d day of December, 1877, the said John G. Brown, as such assignee of said Cadwells, brought an action in the United States district court against the plaintiff in

this action to set aside the judgment recovered by the plaintiff in the State court against said Cadwells (which was recovered by default), and also the executions issued thereon, and to recover the property levied upon from the plaintiff, or its proceeds, on the ground that said judgment was an unlawful transfer and preference under the said bankrupt law as against complainant, John G. Brown, assignee as aforesaid. The bill of complaint in said action is hereto annexed and marked Exhibit "A."

The plaintiff in this action, the said The Jefferson County National Bank, defendant in that action, answered the complaint, a bill in equity, which answer is hereto annexed and marked Exhibit "B."

Thereupon, issue being joined, the court appointed a special examiner to take certain testimony and report the same to the court; and, said examiner having taken the testimony, the cause came on for hearing and trial.

22 Whereupon the said district court made and filed an opinion or decision in writing of the issues in the case; which opinion or decision is hereto annexed, marked Exhibit "C." And afterwards, at a term of said court held at Syracuse on the 30th day March, 1880, Hon. William J. Wallace, district judge, presiding, the said court made and caused to be duly entered in the records thereof a judgment or decree in the case in the words following:

(Title of the Cause.)

"This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.: That the five several judgments which the defendant, The Jefferson County National Bank, recovered in the supreme court of the State of New York on the 6th day of April, 1877, against the above-named Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, bankrupts, for the several respective sums of damages and of costs mentioned and set forth in the bill of complaint in this action, and judgments-rolls whereof were on said 6th day of April, 1877, filed and judgments docketed in the clerk's office of the county of Jefferson, and the several executions issued upon said judgments to the sheriff of the county of Jefferson are and hereby are decreed to be void as against the complainant, John G. Brown, as assignee in bankruptcy of the estate, property, and effects of said brankrupts, and that the moneys, to wit, $9,351.50, which arose from the sale of the said property of the said bankrupts by Abner W. Peck, as special receiver of the estate, property, and effects of the said bankrupts, belong to and are hereby decreed to belong to the said complainant, John G. Brown, as such assignee in bankruptcy as aforesaid, which moneys are now on deposit with the First National Bank of Utica, at Utica, N. Y., subject to the order of this court, and that the said complainant,

23 John G. Brown, as such assignee in bankruptcy as aforesaid, recover of said defendant, The Jefferson County National Bank, the sum of —— dollars for his costs and disbursements in this action, to be duly taxed and inserted in this decretal judgment.

WILLIAM J. WALLACE."

Thereupon the plaintiff in this action and defendant in that duly appealed from the foregoing decree and from the decision and opinion therein to the circuit court of the United States for the northern district of New York; and the cause having been brought on for hearing in that court, the decision, judgment, and decree of the district court appealed from and hereinbefore set forth were in all things duly affirmed and judgment of affirmance and for costs was duly entered in that court on the 15th day of March, 1881.

It was admitted at the trial that the defendant in this action was an accommodation endorser of the notes described in the complaint.

The defendant also proved that after the levy by the sheriff under the judgment obtained by the plaintiff in the State courts on said notes against said Cadwells an order was made on the 1st day of May, 1877, by the district court, a copy of which is hereto annexed and marked Exhibit "D;" it was also proved that on the 9th day of April, 1877, an order was made by said district court, a copy of which is annexed, marked Exhibit "E."

The foregoing facts being proved, the defendant rested.

The defendant then requested the court to dismiss the complaint on the grounds:

1. That upon the undisputed facts in the case the plaintiff is not entitled to recover.

2. The plaintiff having obtained against the makers of the notes, who were primarily liable for their payment, a fraudulent and preferential judgment and levy under the bankrupt law, it thereby
24 precluded itself and the defendant, the endorser, from proving the notes or any part thereof in bankruptcy against the makers or their estate or sharing in the distribution thereof on said notes.

3. The plaintiff, by so dealing with the makers as to preclude itself from enforcing the notes against their property, has discharged the endorser.

The court denied the motion and the defendant excepted.

The defendant requested the court to find as follows:

1. That the plaintiff, in obtaining such judgment and levy, precluded itself from proving the notes against the bankrupts' estate.

2. That the defendant is discharged from liability as endorser and entitled to judgment.

The court refused to find and decide as requested in either of said propositions, and the defendant excepted.

The court ordered judgment for the plaintiff, and the defendant excepted, and judgment was entered in Jefferson county clerk's office October 25, 1882, for damages, $3,824.84; costs, $75.04; total, $3,899.88.

Whereupon the defendant duly made, filed, and served exceptions to said decision, which are hereto annexed and form part of this case. The pleadings are also hereto annexed and form part of the case.

O'BRIEN & EMERSON,
Defendant's Attorneys, 6½ Washington Place, Watertown, N. Y.

I hereby certify that I have this day settled and signed the case in the above-entitled action, as appears above, and I direct that the same be filed.

Dated June 2, 1883.

IRVING G. VANN, *J. S. C.*

25 EXHIBIT "A."

In the District Court of the United States for the Northern District of New York. (In Equity.)

JOHN G. BROWN, as Assignee in Bankruptcy of the Estate, Property, and Effects of Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, Bankrupts,
against
THE JEFFERSON COUNTY NATIONAL BANK, Defendant.

To the Honorable William J. Wallace, judge of the district court of the United States for the northern district of New York:

John G. Brown, of the city of Utica, in the county of Oneida and State of New York, as assignee in bankruptcy of the estate, property, and effects of Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, bankrupts, and a citizen of the United States, brings this his bill against the Jefferson County National Bank, a corporation or banking association duly constituted and organized under and by virtue of an act of the Congress of the United States of America entitled "An act to provide a national currency secured by a pledge of the United States stocks, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and the act of the legislature of the State of New York entitled "An act enabling the banks of this State to become associations for the purpose of banking under the laws of the United States," passed March 9, 1865, and located and doing business in the city of Watertown, in the county of Jefferson, State of New York, and within said northern district of New York.

And thereupon your orator complains and says that on the 6th day of April, 1877, a petition in bankruptcy was duly filed in
26 the district court of the United States in and for the northern district of New York against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, who then resided and now reside in the city of Watertown, county of Jefferson, State of New York, and district aforesaid, then and now citizens of the United States, who at the time and for over a year prior thereto were and had been copartners in trade, doing business under the firm name of H. V. Cadwell & Co.

That such proceedings were thereafter had on said petition that on or about the first day of May, 1877, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell were duly adjudged and declared bankrupts by the said district court for the northern district of New York, pursuant to the provisions of an act of Congress entitled "An act to establish a uniform system of bankruptcy

throughout the United States," approved March 2, 1867, and the Statute of the United States, title Bankruptcy.

That the said matter was thereupon duly referred by an order of said court to Miles A. Hackley, Esq., one of the registers of said court, and such proceedings were duly had and taken in said matter before said register that on or about the 29th day of May, 1877, your orator was duly elected and appointed the assignee in bankruptcy of the estate, property, and effects of the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, said bankrupts, and his appointment or election as such assignee was thereafter duly approved and confirmed by the judge of said court.

That your orator duly accepted such trust, duly qualified, and is now such assignee.

That on the or about the eighteenth day of June, 1877, the said Miles A. Hackley, Esq., as such register in bankruptcy, before
27 whom such proceedings were duly had as aforesaid in said matter, did by an instrument in writing of that date, under his hand and the seal of said court, convey and assign to your orator as such assignee as aforesaid all the estate, real and personal, of the said bankrupts, Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, and each of them, including all the property and rights, of whatever kind, of which they and each were possessed or in which they or either had an interest or were entitled to have on the sixth day of April, A. D. 1877, with all deeds, books, and papers relating thereto.

And your orator further shows upon information and belief that on the 16th day of March, 1877, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, individually and as composing the firm of H. V. Cadwell & Co., were insolvent and in contemplation of insolvency, and were owing debts to an amount exceeding the sum of three hundred dollars and about the sum of $40,000.

1. That on the said 16th day of March, 1877, and within two months before the filing of said petition in bankruptcy in said matter against said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, the defendants The Jefferson County National Bank, being a creditor of them, said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, with their assent, connivance, and procurement, and having reasonable cause to believe them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, to be insolvent, and knowing that a fraud on said act was intended, did commence an action in the supreme court of the State of New York, as plaintiff, against them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, as defendants, by service of summons and complaint according to the rules and practice of said supreme
28 court, to recover a debt due from said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell to said The Jefferson County National bank, and that such proceedings were thereafter had in said action that on the 6th day of April, 1877, the said The Jefferson County National Bank, as plaintiff in said action, did recover a judgment therein against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell for the sum of $1,797.31

damages and $23.52 costs, the judgment-roll whereof was, on said sixth day of April, 1877, duly filed and said judgment duly docketed in the clerk's office of Jefferson county, the county in which said Cadwells then resided.

2. That on the said 16th day of March, 1877, and within two months before the filing of the said petition in bankruptcy in said matter against said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, the defendant The Jefferson County National Bank, being a creditor of them, said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, with — assent, connivance, and procurement, and having reasonable cause to believe them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, to be insolvent, and knowing that a fraud on said act was intended, did commence an action in the supreme court of the State of New York, as plaintiff, against them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, impleaded with one John C. Streeter, as defendants, by the service of summons and complaint according to the rules and practice of said supreme court, to recover a debt due from said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell to said The Jefferson County National bank, and that such proceedings were thereafter had in said action that on the 6th day of April, 1877, the said The Jefferson County National Bank, as plaintiff in said action, did recover a judgment therein against the said Henry
29 V. Cadwell, James S. Cadwell, and Lewis A. Cadwell for the sum of $2,770.83 damages and $23.52 costs, the judgment-roll whereof was on said sixth day of April, 1877, duly filed and said judgment duly docketed in the clerk's office of Jefferson county, the county in which said Cadwells then resided.

3. That on the said 16th day of March, 1877, and within two months before the filing of the petition in bankruptcy in said matter against said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, the defendant The Jefferson County National Bank, being a creditor of them, said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, with their assent, connivance, and procurement, and having reasonable cause to believe them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, to be insolvent, and knowing that a fraud on said act was intended, did commence an action in the supreme court of the State of New York, as plaintiff, against them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, impleaded with one William M. Penniman, as defendants, by the service of summons and complaint according to the rules and practice of said supreme court, to recover a debt due from said Henry V. Cadwell, James *James* S. Cadwell, and Lewis A. Cadwell to said The Jefferson County National bank, and that such proceedings were thereafter had in said action that on the 6th day of April, 1877, the said The Jefferson County National Bank, as plaintiff in said action, did recover a judgment therein against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell for the sum of $1,767.11 damages and $23.52 costs, the judgment-roll whereof was on said sixth day of April, 1877, duly filed and said

judgment duly docketed in the clerk's office of Jefferson county, in which county said Cadwells then resided.

4. That on the said 16th day of March, 1877, and within
30 two months before the filing of the said petition in bankruptcy in said matter against said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, the defendant The Jefferson County National Bank, being a creditor of them, said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, with their assent, connivance, and procurement, and having cause to believe them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, to be insolvent, and knowing a fraud on said act was intended, did commence an action in the supreme court of the State of New York, as plaintiff, against them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, impleaded with one Martin V. Kitts, as defendants, by the service of summons and complaint according to the rules and practice of said supreme court, to recover a debt due from said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell to said The Jefferson County National bank, and that such proceedings were thereafter had in said action that on the sixth day of April, 1877, the said The Jefferson County National Bank, as plaintiff in said action, did recover a judgment therein against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell for the sum of $757.83 damages and $23.52 costs, the judgment-roll whereof was on the said sixth day of April, 1877, duly filed and said judgment duly docketed in the said clerk's office of Jefferson county, the county in which said Cadwells then resided.

5. That on the said 16th day of March, 1877, and within two months before the filing of the said petition in bankruptcy in said matter against said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, the defendant The Jefferson County National Bank, being a creditor of them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, with their assent, connivance, and procurement, and having reasonable cause to believe them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell,
31 to be insolvent, and knowing that a fraud on said act was intended, did commence an action in the supreme court of the State of New York, as plaintiff, against them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, impleaded with one Henry C. Normander, as defendants, by the service of summons and complaint according to the rules and practice of said supreme court, to recover a debt due from said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell to said The Jefferson County National bank, and that such proceedings were thereafter had in said action that on the sixth day of April, 1877, the said The Jefferson County National bank, as plaintiff in said action, did recover a judgment therein against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell for the sum of $757.83 damages and $23.52 costs, the judgment-roll whereof was, on said sixth day of April, 1877, duly filed and said judgment duly docketed in the clerk's office of Jefferson county, the county in which said Cadwells then resided.

That on the same day, to wit, the 6th day of April, 1877, executions out of said supreme court in due form, as required by law, were duly issued on each of said judgments above described against the property of said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, directed to the sheriff of said Jefferson county and by him on that day duly received, who, on said sixth day of April, 1877, and within two months before the filing of said petition in bankruptcy against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, and on the same day of the filing of said petition levied the same on certain personal property of said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, to wit, a stock of goods and fixtures in the store owned and kept by said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, at the said city of Watertown, in said Jefferson county, N. Y., consisting of
32 groceries, tobacco, cigars, candies, confections, and various kinds of property and merchandise, together with the fixtures in said store to the amount and of the value of upwards of $10,000; and the said sheriff levied upon, seized, and took possession of said goods, property, and fixtures under and by virtue of said executions and levy thereunder, and duly advertised said property for sale.

That the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, then and there being insolvent and in contemplation of insolvency, did procure and suffer their said property and goods to be seized on said executions with intent to give a preference to said The Jefferson County National bank, a creditor of them, said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, and who had reasonable cause to believe the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell to be insolvent, and who knew that a fraud on said act was intended.

And your orator further shows upon information and belief that the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, being insolvent and in contemplation of insolvency, did, on the sixth day of April, 1877, and within two months before the filing of said petition in bankruptcy as aforesaid against them, procure and suffer their property to be seized on said executions as aforesaid, with the intent to give a preference to said The Jefferson County National bank, who was a creditor of them, and the bank received said preference then and there, having reasonable cause to believe said Cadwells were insolvent and knowing that a fraud on said act was intended.

And your orator further shows upon information and belief that the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, being insolvent or in contemplation of insolvency and
33 bankruptcy and being indebted to divers other persons and firms in a large amount, to wit, upwards of $30,000, no part of which was secured, did, within two months before the filing of said petition in bankruptcy against them as aforesaid and on the said sixth day of April, 1877, procure and suffer their property, to wit, the stock of goods, tobacco, merchandise, and fixtures aforesaid, to be seized and taken on the executions so issued as aforesaid, with in-

tent thereby and by means thereof to give a preference and to prefer the said The Jefferson County National Bank, the defendant in this action, who was then and there a creditor of them, said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, over their other creditors, and that the Jefferson County National bank accepted said preference then and there, having reasonable cause to believe said Cadwells insolvent and knowing that a fraud on said act was intended, and that said preference was intended; that at the time when said actions were commenced and when said executions were issued and levied and the goods and property seized as aforesaid the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell were largely indebted to divers other persons and firms besides the said bank, said defendant, and whose demands were wholly unsecured, all of which was well known to said defendant.

And your orator further shows that on or about the ninth day of April, 1877, an order was granted out of this court in the aforesaid bankrupt matter by the Honorable William J. Wallace, judge of said court, enjoining and restraining the sheriff of said Jefferson county, who held the execution as aforesaid, and this defendant, among others, from selling or disposing of the property so seized by virtue of said executions as aforesaid, which said order was, on or about the 11th day of April, 1877, duly served on this defendant and the said sheriff of Jefferson county; that at a term of this court

34 in bankruptcy held at Syracuse on the first day of May, 1877, at the time of the adjudication of said Cadwells in bankruptcy as aforesaid, an order was duly made and entered in said bankruptcy matter, the said defendant herein duly appearing and consenting thereto, appointing Abner W. Peck, Esq., of Watertown, in said Jefferson county, N. Y., who was then sheriff of said county and had the executions as aforesaid, a special receiver of the estate, property, and effects of said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, directing him, as such special receiver, to sell the stock of goods and personal property so levied upon by him as such sheriff as aforesaid, and, after deducting his fees and expenses, to deposit with the depository of said court the moneys arising on said sale; that in pursuance of said order the said Abner W. Peck, as such special receiver, sold said property in pursuance of said order, and, after deducting his fees and expenses, deposited, July 5th, 1877, with the First National Bank of Utica, at Utica, Oneida county, N. Y., the sum of $9,351.50, where the same now remains subject to the order of this court, the lien, if any, of said defendant, by virtue of the execution aforesaid, to attach to said fund.

That before the commencement of this action your orator, as such assignee as aforesaid, duly demanded of said defendant that it surrender its said preference and all benefit derived from said judgments and each of them, and that said defendant surrender any and all liens said The Jefferson County National bank had or claimed to have by virtue of the executions and levy thereunder as aforesaid; each and all of which said defendant then refused and still refuses to do, against the rights and equities of your orator.

That the said several judgments above described so in favor of said defendant as aforesaid and the executions and levies thereunder and each thereof are void and of no legal force or ef-
35 fect as against your orator by reason of the premises aforesaid, and the goods and property so levied as aforesaid by said sheriff and the moneys arising on said sale by said special receiver as aforesaid and now on deposit in the First National Bank of Utica as aforesaid belong to your orator in equity.

Your orator therefore prays, as such assignee in bankruptcy as aforesaid, relief and judgment as follows:

That it be adjudged and decreed by this honorable court that the said several judgments aforesaid are void and without legal force and effect as against your orator and in fraud of the provision of the said bankrupt act and the creditors aforesaid on the grounds aforesaid, and that said several judgments aforesaid and the said several executions so issued out of said supreme court thereon and all liens created by virtue thereof and all proceedings thereunder be annulled, avoided, vacated, and set aside, and that all the goods and chattels so levied upon as aforesaid be declared to be the property of your orator, and that the moneys arising on the sale of said property by said special receiver, so deposited as aforesaid, be decreed and adjudged to belong to and to be paid over to your orator as such assignee as aforesaid for the reasons aforesaid, to be by him distributed equitably among the creditors of said bankrupts in pursuance of said bankrupt act, and for such other and such further relief, with the costs of this action, as to this honorable court shall seem just and proper to grant in the premises.

And your orator further prays that a writ of subpœna issue from this honorable court, directed to said defendant, The Jefferson County National Bank, and commanding said defendant, by a certain day and under a certain penalty, to appear and answer unto this bill of complaint, and to abide by and to perform such order and
36 decree in the premises as this court shall see fit to grant and as shall be agreeable to equity.

And your orator will ever pray.

JOHN G. BROWN,
Complainant.

RICHARDSON, ADAMS & MANN,
Attorneys and Solicitors for Complainant,
Utica, Oneida County, N. Y.

UNITED STATES OF AMERICA,
Northern District of New York, } ss:

John G. Brown, being duly sworn, on oath doth depose and say that he is the complainant in the above-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN G. BROWN.

Sworn to before me this 12th day of November, 1877.
EDWARD NORRIS,
Notary Public, Oneida County, Utica, N. Y.

37 "EXHIBIT B."

In the District Court of the United States for the Northern District of New York. (In Equity.)

JOHN G. BROWN, as Assignee in Bankruptcy of the Estate, Property, and Effects of Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, Bankrupts,
against
THE JEFFERSON COUNTY NATIONAL BANK, Defendant.

The defendant herein, The Jefferson County National Bank, for answer to the plaintiff's complaint herein, admits that it is such corporation, organized as under the laws and doing business at the place in said complaint alleged.

Defendant also admits that said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell were at the time stated in the said complaint copartners in trade, doing business in the firm name, at the place in said complaint stated, and severally resided at the place therein stated, but as to whether or not, on the 6th day of April, 1877, a petition in bankruptcy was duly filed in the court therein named this defendant has not any knowledge or information sufficient to form a belief, and as to that fact it denies that it has any such knowledge.

And this defendant denies that it has and alleges that it has not any information or knowledge sufficient to form a belief as to whether or not, on or about the first day of May, 1877, the said Henry V., James S., and Lewis A. Cadwell were adjudged and declared bankrupts by the said district court, as alleged in said complaint.

The defendant also denies that it has and alleges that it has not any knowledge or information sufficient to form a belief as
38 to whether or not said matter was referred to Register Hackley, and such proceedings were had before him that said John G. Brown was, on or about 29th May, 1877, appointed assignee in bankruptcy of the estate, property, and effects of the said Henry V., James S., and Lewis A. Cadwell, or that such appointment was thereafter approved and confirmed by such court, or as to whether or not said Brown accepted such trust or duly qualified and is now such assignee, or as to whether or not said Register Hackley conveyed and assigned to said Brown, as such assignee, the estate, real and personal, of the said Cadwells, alleged bankrupts, as in the manner or at the time in said complaint alleged.

The defendant also denies that it has and alleges that it has not any knowledge or information sufficient to form a belief as to whether or not, on the 16th day of March, 1877, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, individually and as composing the firm of H. V. Cadwell & Co., were insolvent and

in contemplation of insolvency, and were owing debts to an amount exceeding the sum of $300 and about the sum of $40,000, as in complaint is alleged; and this defendant denies that it had and alleges it had not on the day last mentioned any knowledge or information or reasonable cause to believe that the said Cadwells, individually or as composing said firm, were insolvent, contemplated insolvency, or were owing the sum of $40,000.

The defendant, further answering said complaint, admits and alleges that on or about the date mentioned therein, March 16, 1877, each of the five several actions therein referred to was commenced in the Supreme Court, in accordance with the rules and practice thereof, against the said Henry V., James S., and Lewis A. Cadwell, as defendants, in favor of this defendant, as plaintiff, by due service of the summons therein personally on said defendant, and, in
39 accordance with law and said rules and practice, such proceedings were regularly had in said actions that judgment was duly recovered in each action at the time and for the sum in said complaint stated, and same were duly entered and docketed in clerk's office of said county of Jefferson.

And this defendant admits and alleges that each of said actions was commenced and each of said judgment- therein was recovered upon and for a claim and debt honestly due and owing by the defendants therein to this defendant, which claims and the evidence of which debts are more particularly referred to in the complaint and the respective judgment-rolls in said action, on file in said clerk's office; and this defendant alleges that said judgment secondly mentioned in said complaint, for $2,770.38 damages, was recovered on several promissory notes made by said H. V. Cadwell & Co. and endorsed by one John C. Streeter, of the city of Watertown, for the benefit of said firm and upon which said notes, being two of $1,000 each and one of $750, said Streeter had been and was duly charged and liable at the time of the commencement of said action or recovery of said judgment thereon, and said Streeter was then perfectly responsible and able to pay the said notes and had means from which the same was collectable, as this defendant alleges on information and belief.

And said action thirdly in said complaint mentioned was commenced and judgment thereon recovered for $1,767.11, besides costs, was commenced and recovered upon certain promissory notes made by said firm and endorsed by one William M. Penniman, of the city aforesaid, for benefit of said firm, and said Penniman had been duly and legally charged and was liable as such endorser thereon for that amount when such action was commenced and said judgment was recovered.

40 And the action fourthly in said complaint mentioned was commenced and judgment therein recovered for $757.83, besides costs, was commenced and the judgment recovered on a promissory note of said firm, endorsed by one Martin V. Kitts, for its benefit, and said Kitts had been and was duly charged and liable as such endorser to this defendant on said note when said action was commenced and judgment recovered thereon.

And said action fifthly in said complaint mentioned was commenced and the judgment therein recovered for $757.83 was commenced and the judgment therein recovered upon a promissory note made by said firm and for its benefit, endorsed by one H. C. Normander, of said city, who at commencement of said action and recovery of said judgment had been duly and legally charged and was liable to pay as such endorser said note.

That the several notes aforesaid on which such judgments were recovered had been received by this defendant from said firm, with such endorser thereon respectively as above stated, and discounted by it in regular course of business; and, on information and belief, this defendant avers that said several endorsers were respectively responsible and able to pay the amount of the said notes by them so severally endorsed and had means and property from which said amount could have been collected when said actions were commenced thereon and when said judgments were so recovered as aforesaid, as well as at the time when said notes were so discounted.

That the entire amount for which said several judgments in complaint mentioned were respectively recovered were justly and honestly due and owing to this defendant upon the various notes and obligations on which same were recovered, and nothing has been paid on any thereof except and made through the levy and sale of property in said complaint and therein referred to; — the proceeds of such sale be applied in payment thereon.

41 The judgment firstly in said complaint mentioned was against the defendants therein as endorser, maker, or drawer of various notes, drafts, and written obligations in the complaint in said action, in the judgment-roll thereof, on file as aforesaid, particularly mentioned, to which reference is made as part of this defense.

This defendant denies that said actions mentioned in the complaint or either thereof was commenced against the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, defendants therein, "with their assent, connivance, and procurement," as alleged in said complaint, and denies that it commenced said action or either thereof "having reasonable cause to believe them, the said Henry V. Cadwell, James S. Cadwell, and Lewis A. Cadwell, to be insolvent and knowing that a fraud on said act (meaning the so-called bankrupt act) was intended."

And this defendant denies that at time of commencement of said actions it had and alleges it had not reasonable cause to believe the said Cadwells, defendants therein, to be insolvent, and it did not then know that a fraud was intended on said act of Congress and the complaint referred to.

This defendant admits that executions were duly issued on said several judgments and delivered to the sheriff of Jefferson county on the said sixth day of April, 1877, and that said sheriff on that day, by virtue thereof, levied upon and seized and took possession of the property of the defendants therein at the place and of the character stated in said complaint, and that sheriff advertised said

property for sale, but whether on that day or not this defendant is unable to state.

And this defendant admits and alleges that said sheriff had so levied upon, seized, and taken possession of all said property
42 prior to the time of the filing of the alleged petition and the commencement of the alleged proceedings in bankruptcy in the complaint mentioned, and said sheriff was in entire control and actual possession of said property prior to the said filing of the said petition in bankruptcy, alleged in the complaint.

This defendant denies on information and belief that the said Cadwells, "then and there being insolvent and in contemplation of insolvency, did procure and suffer their said property and goods to be seized on said executions with intent to give a preference to this defendant, their creditor, and denies that it then had reasonable cause to believe the said Cadwells insolvent, and denies that it knew then that a fraud on said act was intended."

This defendant on information and belief denies that said Cadwells, on the said 6th day of April, 1877, "being insolvent and in contemplation of insolvency," did "procure and suffer their property to be seized on said executions as aforesaid, with the intent to give a preference to said The Jefferson County National bank, who was a creditor of them," the said Cadwells, and defendant denies that said bank received said preference then and there, having reasonable cause to believe said Cadwells were insolvent and knowing that a fraud on said act was intended, as is most untruly alleged in said complaint.

Defendant further alleges that before said several actions were commenced it had been informed and believed that the said firm of H. V. Cadwell & Co., composed of said three Cadwells above mentioned, had a large surplus of property and means over and above all its indebtedness and had discounted its paper in reliance thereon, and when said several actions were commenced it had received no information to the contrary, and then still believed said firm had such surplus and not knowledge or reasonable cause to believe that said firm, or any member thereof, was insolvent or contem-
43 plated insolvency or bankruptcy, and did not commence said action or recover said judgment with a view to obtain any preference in fraud of said act of Congress called the bankrupt law, as it had responsible endorsers on most of the paper sued on, but said action was commenced and prosecuted in the regular and usual course of its dealings with its debtors and in good faith and in ignorance of the extent of the indebtedness of said firm, and had no intent or purpose of gaining any unlawful preference and without any knowledge of any real or contemplated insolvency.

Defendant admits that orders of the district court substantially as alleged in complaint were granted reappointing said sheriff receiver and restraining him from selling as sheriff, and that he sold and deposited the money as alleged, by which order provision is made in effect that the right to this defendant to said money is left to abide adjudication of the court, and it prays said order may be deemed a part of this answer for greater certainty as to its terms.

Defendant admits that the plaintiff has demanded a surrender of its rights under said judgments and the lien acquired by such levy of said executions, which it has declined to do, alleging it has in good faith, without any fraudulent intent or act, acquired such right, and claim it so be adjudged.

The defendant denies on information and belief each and every allegation in said complaint contained and not hereinabove admitted, denied, or otherwise answered.

And this defendant prays judgment and relief that said money realized from said sale and so, as alleged, deposited may be paid over to this defendant in satisfaction of its said judgments and executions, and that said judgments, executions, and the levy thereunder may be adjudged valid, and that said moneys realized from such
44 sale belong to this defendant, and for such other or different relief and order as to this honorable court shall deem just and proper to grant in the premises, with costs of the defense of this action, to be paid this defendant by the plaintiff.

THE JEFFERSON COUNTY
NATIONAL BANK,
Defendant and Respondent.

BROWN & GIBSON,
Attorneys for Defendant and Respondent.

JEFFERSON COUNTY, *ss:*

Talcott H. Camp, being duly sworn, says that he is president of the defendant in above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

T. H. CAMP,
Pres. Jeff. Co. Nat'l Bank.

Subscribed and sworn — this 26th day of January, 1878, before me—

P. NORTON,
Notary Public.

"EXHIBIT C."

United States District Court, Northern District of New York.

JOHN G. BROWN, Assignee, &c.,
ag'st
JEFFERSON COUNTY BANK. } Copy Opinion.

WALLACE, *J.:*

This is evidently a case where the bankrupts, in contemplation of insolvency, desired to secure their endorsers and the defendant, and through the advice of their attorneys concluded to do it by means of judgments and executions. The attorneys employed to bring

actions and obtain judgments were the bankrupts' attorneys, and the defendant is chargeable with all the knowledge they pos-
45 sessed, which was acquired by them in the progress of the suits or present to their minds if acquired previously. Story on Agency, 140; the Distilled Spirits, 11 Wall., 356. They were under no professional obligations not to disclose the circumstances and designs of clients who desired to assist the defendant, and the law presumed that they did communicate their information.

The defendant insists that several objections to evidence should be sustained and the evidence excluded. It was essential to prove the intent on the part of the bankrupts. Their declarations while this intent was being effectuated are as competent as their acts; so also the declarations of the attorney during the progress of the transaction is evidence of their intent and knowledge. The advice given by the attorneys to their clients is excluded because inadmissible under the rule which forbids the disclosure of confidential communications.

A decree is ordered adjudging the several judgments and executions void as against the complainant, and the moneys arising from the sale by the special receiver to belong to the complainant, with costs.

"EXHIBIT D."

At a term of the district court of the United States, in bankruptcy, held in and for the northern district of New York, at the city of Syracuse, on the first day of May, A. D. 1877.

Present: Hon. William J. Wallace, district judge.

In the Matter of HENRY V. CADWELL, JAMES S. CADWELL, and LEWIS A. CADWELL, Bankrupts. No. 5376.

46 Upon the petition and adjudication in this matter, on motion of George W. Adams, attorney and of counsel for petitioning creditors, P. C. Williams, Esq., attorney and of counsel for said bankrupts and for the Jefferson County National bank and David A. Van Sbaick, judgment creditors, appearing and consenting hereto, it is hereby ordered that Abner W. Peck, Esq., of Watertown, N. Y., be, and he hereby is, appointed the special receiver of the estate, &c., of said bankrupts in this matter, and that he, as such special receiver, be, and hereby is, directed to sell at public sale, in said Watertown, the stock of goods and other personal property of said bankrupts not exempt for cash on a notice of the time and place of said sale being served by mail on all the known creditors of said bankrupts at least ten days before said sale and published in the Watertown daily papers, said goods to be sold by the piece and in small assorted classified lots, as shall be for the best interest of the creditors. The compensation of said special receiver shall be a sum equal to the amount to which he would be entitled if said property were sold in the usual way upon executions, including necessary disbursements for making inventory, care of property, and sale of same, said Peck hereby waiving any and all fees as sheriff to which he might other-

wise be entitled on executions in his hands; the moneys arising on said sale to be deposited in the usual depository, pursuant to the rules and practice of this court, subject to the further order of the court, the lien of said judgment creditors, if any, to follow and attach to the moneys arising from said sale.

But the order shall in no way or manner change or prejudice the rights of said petitioning and judgment creditors, but their respective rights shall be and remain as if this order had not been made and the property not been sold.

(W. J. W.)

47 Witness the Hon. Wm. J. Wallace, judge of said court, and the seal thereof, at Syracuse, in said district, this 1st day of May, A. D. 1877.

[L. S.] WINFIELD ROBBINS, *Clerk.*

Filed May 1, 1877.

EXHIBIT "E."

At a term of the district court of the United States, in bankruptcy, held in and for the northern district of New York, at the city of Syracuse, on the 9th day of April, A. D. 1877.

Present: Hon. William J. Wallace, district judge.

In the Matter of HENRY V. CADWELL, JAMES S. CADWELL, and LEWIS A. CADWELL, Alleged Bankrupts. No. 5376.

Upon the original petition in said matter, filed April 6th, 1877, and upon the petition of Daniel N. Crouse and John G. Brown, dated April 7th, 1877, wherein, among other things, it appears that the Jefferson County National Bank of Watertown, N. Y., recovered, April 6th, 1877, five judgments against said alleged bankrupts, as follows:

One for $1,820.83, one for $781.35, one for $279.31, one for $781.35, one for $1,790.63; also that on the same day one David A. Van Schaick recovered a judgment against said alleged bankrupts for $484.79; upon all which executions have been issued to the sheriff of Jefferson county; that on the same day and soon after the recovery of said judgments said alleged bankrupts made an assignment to one Henry Hareford; that levies have been made by said sheriff on the property of said alleged bankrupts:

48 Now, on motion, it is hereby ordered that the said Jefferson County National bank, its agents and attorneys; said David A. Van Schaick, on their several executions, and Henry Hareford, as assignee, &c., and all other persons be, and they are hereby, enjoined and restrained from selling, disposing of, or interfering with the property of said alleged bankrupts or either, and that the sheriff of said Jefferson county and his deputies be enjoined and restrained from selling, disposing of, or in any manner interfering with said alleged bankrupts' property by virtue of any executions issued on the above-described or any judgments against said

alleged bankrupts, and any sale of said property now advertised by said sheriff by virtue of said or any executions is hereby staid until the further order of this court, this order to continue in force until twenty days shall have expired after an assignee is chosen and has qualified, unless sooner modified.

W. J. WALLACE,
District Judge.

Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK
vs.
JOHN C. STREETER. } Statement under Rule 41.

Action commenced by service of summons on defendant September 1st, 1881.

Complaint served September 15th, 1881.

Answer served September 22d, 1881.

The names of all the parties, plaintiff and defendant, are fully set forth in above title to this action, and there has been no change of parties since commencement thereof.

O'BRIEN & EMERSON,
Defendant's Attorneys.

49 In Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK
vs.
JOHN C. STREETER. } Opinion.

THE SAME
vs.
HENRY C. NORMANDER.

Actions against defendants as endorsers upon promissory notes made by H. V. Cadwell & Co. tried before this court without a jury at the Jefferson circuit on the 26th day of April, 1882.

Summed up and submitted June 27th, 1882.

John Lansing, for plaintiff.

D. O'Brien, for defendant.

VANN, *J.:*

Judgment ordered for plaintiff in each action, with costs.

Findings may be prepared and submitted to the counsel for defendants, who is at liberty to propose amendments before they are presented for my signature.

Held that the debt is provable by the plaintiff, and hence that the defendants are not discharged.

50 In Supreme Court, Jefferson County.

THE JEFFERSON COUNTY NATIONAL BANK, Respondent, *ag'st* JOHN C. STREETER, Appellant. } Judgment, May 12, 1885, at 4½ p. m.

An appeal having been taken to the general term of this court from a judgment entered in Jefferson county clerk's office on the 25th day of October, 1882, for the sum of $3,899.88, damages and costs, and said appeal having been duly brought to argument and the decision and order of said general term having been duly filed and entered, affirming said judgment with costs, and said costs having been duly taxed at $140.37—

Now, on motion of John Lansing, attorney for the plaintiff and respondent, it is adjudged that the said judgment above mentioned be, and the same hereby is, in all things affirmed; and it is further adjudged that the respondent, The Jefferson County National Bank, recover of the appellant, John C. Streeter, the sum of $140.37, as and for its costs and disbursements on said appeal, and that it have execution therefor.

H. HAREFORD,
Deputy Clerk.

51 THE JEFFERSON CO. NAT. BANK *vs.* JOHN C. STREETER, Appellant. } Syracuse General Term. Jan., 1885. Hardin, Follett and Boardman.

BOARDMAN, *J.:*

The defendant was sued as an endorser of a promissory note made by H. V. Cadwell & Co. and discounted by the plaintiff and duly charged by the protest of the note when due. On the 6th day of April, 1877, a judgment was duly recovered by default against the makers, after service of summons and complaint upon them, for principal and interest due upon the notes. Execution was issued upon the judgment and a levy made upon property of the makers sufficient to satisfy the judgment. On the same 6th day of April a petition in bankruptcy was filed in the district court of the United States against Cadwell & Co., and on May 1st, 1877, they were adjudged bankrupts and an assignee appointed. By order of the district court the sheriff was enjoined from selling on his execution and was afterward appointed special receiver in bankruptcy and by direction of the district court sold the property levied upon and deposited the money realized, subject to the order of the district court. The assignee in bankruptcy afterwards brought an action in the bankrupt court against the bank and recovered a judgment setting aside the bank's judgment and all liens acquired under it and ordered the money realized paid over to the assignee, which was done. On appeal by the bank said judgment was duly affirmed. It is conceded that the security attempted to be obtained by the bank against Cadwell & Co. was constructively fraudulent as against the bankrupt

law. As, however, the bank pursued only a lawful remedy in a lawful manner without receiving any preference by any act of Cadwell & Co., actual fraud was not shown.

52 Under such circumstances, and especially when the property seized under execution and its proceeds were taken out of the possession of the bank and turned over to the assignee in bankruptcy by the judgment of the district court, the transaction amounts to a surrender under section 5084 of U. S. Rev. St., if such section is still in force and not repealed by section 9, ch. 390, of U. S. law of 1874; *In re* Black, 17 N. B. Reg., 399; *In re* Reordon, 14 *id.*, 332; *In re* Newcomb, 18 *id.*, 85; *In re* Schoonuber, 15 *id.*, 305. A mere fraud on the bankrupt law by acceptance of a preference in violation of its provisions was held by Judge Blatchford, *In re* Reordon, *surpra*, not to be actual fraud under the United States law. Such conclusion seems just and equitable. The bringing of an action by a creditor in the ordinary mode of procedure in the State courts and procuring a judgment may be, as in this case, constructive fraud, for which the lien will be set aside. But even that will depend upon the further fact, that bankrupt proceedings shall be instituted within the limited time provided by law. If such proceedings are not so begun the lien would be valid and effectual. How, then, can it be construed to be actual fraud to pursue a legal remedy which may be efficacious, and especially when no action of the bankrupt debtor gives the creditor the obnoxious preference?

As the creditor gained no advantage in fact by his judgment and collected nothing under it, and as the assignee in bankruptcy received all the proceeds of the bankrupt's estate, no reason is apparent why the debt should be forfeited in whole or in part by a legal attempt to collect it. Still less is it apparent why an endorser should be discharged from his liability because the creditor endeavored to satisfy the debt out of the property of the maker in aid and exoneration of the endorser.

53 From the resp't's brief it further appears that the plaintiff's debt has been proved and allowed in these same bankrupt proceedings, so that the surety or endorser has lost nothing by the previous action of the plaintiff in its attempt to collect its debt. While such fact may not be before us in a manner proper for our recognition, the opinion of the learned judge is a strong argument to sustain the legal conclusion to which we have come.

For these reasons we think the judgment should be affirmed, with costs.

THE JEFFERSON CO. NAT. BANK
vs.
HENRY C. NORMANDER.

For the same reasons the judgment in this case should be affirmed, with costs.

I concur.

J. L. F.
G. A. H.

Not for publication.

54 At an adjourned special term of the supreme court held at the court-house, in the city of Watertown, in & for the county of Jefferson, on the 11th day of June, 1887.

Present: Hon. P. C. Williams, justice.

THE JEFFERSON COUNTY NATIONAL BANK
ag'st
JOHN C. STREETER.

The defendant having appealed to the court of appeals from the judgment heretofore and on the 12th day of May, 1885, entered in the above-entitled action affirming the judgment entered in said action on the 25th day of October, 1882, and said court of appeals having heard the said appeal and having ordered and adjudged that said judgment so appealed from be affirmed and judgment rendered for the plaintiff, with costs:

Now, upon filing the remittitur from said court of appeals and upon motion of John Lansing, attorney for said plaintiff, it is—

Ordered that said judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the aforesaid judgment of May 12th, 1885, herein be, & the same hereby is, affirmed, and that judgment of this court be entered affirm-

55 ing said judgment, with costs of said appeal, against the defendant to be taxed.

Enter.

WILLIAMS.

[Endorsed:] In supreme court. The Jefferson County National Bank *vs.* John C. Streeter. Copy. Order. John Lansing, pl'ff's att'y, 10½ Washington St., Watertown, N. Y. Filed June 11, '87.

SIRS: You will take notice of an order, of which the within is a copy, entered in Jeff. Co. cl'k's office on the 11th day of June, 1887.

Dated June 11th, 1887.

Yours, etc.,

JNO. LANSING,
Pl'ff's Att'y.

To O'Brien, Emerson & Ward, d'f't's att'ys.

56 In Supreme Court.

THE JEFFERSON COUNTY NATIONAL BANK, Pl'ff,
ag'st
JOHN C. STREETER, Def't.
} Judgment. June 11th, 1887, at 11 a. m.

The defendant having appealed to the court of appeals from the judgment heretofore and on the 12th day of May, 1885, entered in the above-entitled action affirming the judgment entered in said action on the 25th day of October, 1882, and said court of appeals having heard the said appeal and ordered & adjudged that said judgment so appealed from be affirmed, with costs, and the remittitur from said court of appeals having been duly filed in this court and an order duly entered thereon making the judgment of the

court of appeals the judgment of this court and directing judgment to be entered herein as hereinafter adjudged, with costs, and the plaintiff's costs having been duly taxed at the sum hereinafter stated:

Now, on motion of John Lansing, attorney for said plaintiff, it is adjudged that the judgment hereinbefore mentioned entered herein on the 12th day of May, 1885, be, and the same hereby is, affirmed.

And it is further adjudged that the plaintiff, The Jefferson County National Bank, recover from the defendant, John C. Streeter, the sum of one hundred and fourteen dollars and six cents, the
57 amount of its costs herein as taxed, and have execution therefor.

F. WADDINGHAM, *Dep. Cl'k.*

[Endorsed:] In supreme court. The Jefferson County National Bank *vs.* John C. Streeter. Copy. Judgment. John Lansing, pl'ff's att'y, 10½ Washington St., Watertown, N. Y. Filed June 11, '87.

SIRS: You will take notice of a judgment, of which the within is a copy, entered in Jeff. Co. cl'k's office on the 11th day of June, 1887.

Dated June 11th, 1887.

Yours, &c., JNO. LANSING,
Pl'ff's Att'y.

To O'Brien, Emerson & Ward, def't's att'ys.

58 THE JEFFERSON COUNTY NATIONAL BANK, Respondent,
v.
JOHN C. STREETER, Appellant.

JUNE 7TH, 1887.

ANDREWS, *J.:*

There has been some conflict of judicial opinion in the courts of the United States as to the true construction of that part of the amendation to § 39 of the bankrupt act of 1867 made by the act of Congress of June 22, 1874, which relates to the proof of debts by creditors who had obtained a fraudulent preference on the property of the bankrupt. The original § 39 authorized the assignee of a bankrupt to maintain an action to recover back money or property paid, conveyed, sold, assigned, or transferred by the bankrupt contrary to the act, "provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the act was intended or that the debtor was insolvent," and the proviso is followed by the declaration that "such creditor shall not be allowed to prove his debt in bankruptcy." The amendment of 1874 substitutes for the last clause in § 39 the following: "And such person, if a creditor, shall not in case of actual fraud be allowed to prove for more than a moiety of his debt."

It was held by Judge Blatchford, while sitting as district judge in the case *In re* Stern (16 N. B. Reg., 569), that the only effect of the

amendment of 1874 was to create a limitation upon the right
59 to prove debts on a voluntary surrender under section 23 of the act of 1867, and to forbid a creditor, in case of actual fraud on his part in obtaining the preference, to prove for more than one-half his debt, notwithstanding he may have surrendered what he had received; but this construction of the amendment of 1874 has not been generally adopted. On the contrary, it has been held in several cases, both in the district and circuit courts of the United States, that the intention and true construction of the amendment was to mitigate the harshness of the rule prescribed in the original section 39, which prohibited a creditor who had obtained a preference in fraud of the act from proving his debt, although he had been deprived of the benefit of the preferential provision, and to confine the prohibition to cases of actual as distinguished from constructive fraud, and even in cases of actual fraud to limit the penalty of the fraud to a denial of the right to prove the debt as to a moiety only. (*In re* Black, 17 N. B. Reg., 399, dist. court Mass.; *In re* Newcomer, 18 *id.*, 85, dist. court; *id.*, 283, dist. court N. J.; Barr *v.* Hopkins, 12 *id.*, 211, cir. court Wis.; *In re* Reed, 3 Fed. Rep., 798, cir. court Mass.; *In re* Cadwell, dist. court, N. dist. N. Y., 1875; S. C. affirmed cir. court.)

This construction is sustained by a large preponderance of judicial authority, and, what is especially important to notice, it has the sanction of the district and circuit courts of New York, having the original and final appellate jurisdiction in cases of bankruptcy arising within this State. We think this construction is sensible, and, although there may be reason for doubt, we are disposed to follow the general current of authority upon the question
60 and to hold that in cases coming within section 39 of the act of 1867 the effect of the amendment of 1874 was to remove the prior absolute prohibition against the proof of a debt by a creditor who had obtained a preference which had been annulled and to confine the *the* prohibition to cases of actual fraud and to limit it even in those cases to a disability to prove more than one-half of the debt.

The original judgments in favor of the bank against Caldwell & Co. were recovered on notes made by Caldwell & Co., endorsed by the defendant, Streeter. They were obtained in due course on default after personal service of process on the defendants in the action. Executions on the judgments were issued to the sheriff and were levied on a stock of goods of Caldwell & Co. prior to the commencement of the bankruptcy proceedings against the firm. By an order of the district court, made after the filing of the petition in bankruptcy, upon the application of the petitioning creditors, the attorney for the bank consenting thereto, the sheriff was appointed special received of the estate of the bankrupts and was directed to sell the property levied on and deposit the proceeds of the sale with the usual depositary, subject to the further order of the court; but the order provided that "the lien of the judgment creditors, if any," should "follow and attach to the moneys arising from the sale." It was adjudged in the action subsequently brought by the assignee in bank-

ruptcy that the judgments of the bank were void as against such assignee, and that he was entitled to the fund, the proceeds of the goods sold by the sheriff under the order of the bankruptcy court. The judgment in the action by the assignee in bankruptcy does
61 not on its face disclose the particular grounds upon which the adjudication therein proceeded. Without going into detail, it is sufficient to say that it is to be collected from the pleadings and the opinion of the court that the judgments and executions in the State courts were set aside as a fraudulent preference, not on the ground of any actual fraud on the part of the bank or its officers, but for constructive fraud growing out of the fact that its attorney who procured the judgment had notice of the insolvency of Caldwell & Co. at the time of commencing the actions in favor of the bank and designed to obtain a preference by means of the proceedings in the State courts, which was imputable to the bank and rendered the judgment void. (See opinion of Wallace, J., MSS.; Brown *v.* Jeff. Co. Bank, 19 Blatch., 315.) It was not, therefore, a case of actual fraud within the act of 1874. It is not very easy to define what is meant by actual fraud in this statute. Judge Lowell, in the case of *In re* Black (17 N. B. Reg., 319), referring to these words, said: "The meaning of the statute appears to be plain that after a recovery of the damages and costs the creditor may prove his debt if he have not actually assisted in the fraud." It would seem to require something more than mere imputable fraud to debar a creditor who has acquired an unlawful preference from proving his claim after he has been deprived of his security. The words "actual fraud" were apparently employed in contradistinction to legal or constructive fraud, and are only satisfied, we think, where actual complicity or a conscious purpose on the part of the creditor to accaccomplish a known fraud upon the act is shown.

The evidence comes far short of this proof in this case, and
62 *and* the bank was not therefore debarred from proving its debt, providing the obtaining of the judgments and the levy upon the property of the bankrupts under the executions was a conveyance, sale, assignment, or transfer of the property of the bankrupt within section 39 of the act of 1867.

We think these terms must be construed to embrace such a transaction as this, otherwise it would happen that a creditor who merely proceeded to judgment, execution, and levy what afterwards were set aside at the suit of the assignee in bankruptcy as constructively fraudulent would be in a worse plight as to proving his debt than a creditor who had actually taken and applied the property of the bankrupt upon his debt by way of preference. It cannot be supposed that this discrimination could have been intended. The right of the bank to prove its debt was affirmed by the district and circuit courts in this State in respect to another debt held by the bank against the same bankrupt under precisely similar circumstances. It follows that the defendant was not prejudiced by the act of the bank in its dealings with Caldwell & Co. It did not therefore preclude itself from proving its debt against the estate of Caldwell & Co. in bankruptcy nor interfere with the right of the defendant as

endorser. The consent of the bank to the order of the district court appointing the sheriff as special receiver and directing a sale of the goods levied upon is not a defense. The order preserved the lien of the execution, if any, and transferred it from the goods to the proceeds. It was subsequently decided by a court of competent jurisdiction that no lien was acquired as against the assignee in
63 bankruptcy. The judgment of the bankrupt court was conclusive upon the bank, and the question is not open for contestation by the defendant. We think the judgment below is right, and it should therefore be affirmed.

"All concur."

A copy.

H. E. SICKELS,
Reporter, S. C.

64 Supreme Court of the United States.

JOHN C. STREETER, Plaintiff in Error,
against
THE JEFFERSON COUNTY NATIONAL BANK, Defendant in Error.

Know all men by these presents that we, Fred. W. Streeter, of the city of Watertown, in the county of Jefferson and State of New York, and G. Harrison Smith, of the same place, are held and firmly bound unto The Jefferson County National Bank, the above-named defendant in error, in the sum of ten thousand dollars, to be paid to the said Jefferson County National Bank; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 19th day of July, 1887.

Whereas the above-named John C. Streeter has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the State of New York, upon remittitur from the court of appeals of the State of New York, in an action wherein the above-named The Jefferson County National Bank is plaintiff and the above-named John C. Streeter is defendant:

Now, therefore, the condition of this obligation is such that if the said John C. Streeter shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good,
65 then this obligation shall be void; otherwise to remain in full force and virtue.

FRED. W. STREETER. [L. S.]
G. H. SMITH. [L. S.]

Sealed, delivered, taken, and acknowledged this 19th day of July, 1887.

L. H. AINSWORTH,
U. S. Comm'r.

UNITED STATES OF AMERICA, }
Northern District of New York. }

Fred. W. Streeter & G. Harrison Smith, of Watertown, N. Y., being duly sworn, say and each for himself says that he is worth the sum of ten thousand dollars over and above his just debts and liabilities.

FRED. W. STREETER.
G. H. SMITH.

Subscribed and sworn to this 19th day of July, 1887.
L. H. AINSWORTH,
U. S. Comm'r.

I approve the foregoing bond as to form and sufficiency.
Dated this 20 day of July, 1887.
WM. C. RUGER,
Ch. J. C't of Appeals of the State of New York.

Endorsed: Filed —.

66 [Endorsed:] United States Supreme Court. John C. Streeter, plaintiff in error, against The Jefferson County National Bank, defendant in error. Copy. Supersedeas bond. Denis O'Brien, attorney for plaintiff in error, Watertown, N. Y. Jefferson Co. clerk's office. Filed Jul- 27, 1887.

67 To the Honorable William C. Ruger, chief judge of the court of appeals of the State of New York:

And now comes John C. Streeter, of the city of Watertown, in the county of Jefferson and State of New York, by Denis O'Brien, his attorney, and complains that in the record and proceedings and also in the rendition of judgment of a plea in the suit between The Jefferson County National Bank, plaintiff, and John C. Streeter, defendant, which is in the supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to the said supreme court of the State of New York the record in the said suit, with an order affirming the order of judgment of the said supreme court at general term, which order and determination of said general term affirmed a judgment rendered by said supreme court at a circuit — held in the county of Jefferson, in said State, in favor of the plaintiff and against the defendant and entered in the clerk's office of the county of Jefferson on the 25th day of October, 1882, for $3,899.88, and said court of appeals directed that the same be enforced; upon which direction a judgment of affirmance was entered in said supreme court of the State of New York on the 11th day of June, 1887, for $114.06, costs.

In and by the answer or plea in said action interposed by said John C. Streeter to the plaintiff's complaint and cause of action he, the said defendant, set up, claimed, and asserted a right, privilege, defence, or immunity under and by virtue of an act of Congress of the United States, to wit, the act entitled "An act to establish a

uniform system of bankruptcy throughout the United States," passed March 2, 1867, and the several acts supplementary thereto
68 and amendatory thereof, and the decision of the said court of appeals and said supreme court is against the right, privilege, defence, or immunity so specially set up and claimed by said defendant.

The said defendant, being an endorser of the notes described in the complaint in said action, interposed for a defence that the plaintiff before suit against the defendant had caused to be entered and procured against the maker thereof a fraudulent and preferential judgment prohibited by said act of Congress; that by reason thereof the said plaintiff was precluded from proving its debt against the makers, who were when said judgment was obtained insolvent, to the knowledge of said bank, and shortly thereafter were adjudged bankrupts under said act of Congress, and that the defendant, by reason of the act of the plaintiff in that regard, became and was in law discharged from any liability as endorser upon the note described in the complaint, and the decision of said court of appeals and supreme court was that, notwithstanding said fraudulent and preferential judgment, the plaintiff was not debarred from proving said note against the estate of said bankrupt makers, and the defendant was not injured thereby or discharged; all of which will more fully appear by an inspection of the pleadings in the action and the opinion of the court of appeals of the State of New York, to which reference is hereby made.

Wherefore in the record and proceedings in said suit manifest error hath happened, to the great damage of the said defendant, John C. Streeter.

Wherefore the said defendant, John C. Streeter, by his attorney aforesaid, prays for the allowance of a writ of error and
69 such other process as may cause the said error to be corrected in the Supreme Court of the United States.

Dated July 19th, 1887.

DENIS O'BRIEN,
Att'y for John C. Streeter, Petitioner, &c., Watertown, N. Y.

70 [Endorsed:] United States Supreme Court. John C. Streeter, plaintiff in error, against The Jefferson County National Bank, defendant in error. Copy. Petition for writ of error. Denis O'Brien, attorney for plaintiff in error, Watertown, N. Y. Jeff. cou. clerk's office. Filed Jul- 27, 1887. Allowed. Wm. C. Ruger, ch. J. of the court of appeals of the State of New York.

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable justices of the supreme court of the State of New York, in the fourth judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, on a remittitur from

the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you or some of you the final decree or judgment of said court to be enforced in the suit between The Jefferson County National Bank, plaintiff, and John C. Streeter, defendant, wherein the said John C. Streeter by his plea, answer, or defence set up and interposed to the said plaintiff's complaint and cause of action a right, privilege, defence, or immunity under and by virtue of an act of Congress of the United States, to wit, "An act to establish a uniform system of bankruptcy throughout the United States," passed March 2nd, 1867, and of the several acts supplementary thereto and amendatory thereof, and the decision of the said court of appeals and your said supreme court is against the right, privilege, defence, or immunity so specially set up, interposed, and claimed by said defendant, a manifest error hath happened, to the great damage of the said John C. Streeter, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the
72 United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 2nd Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

W. S. DOOLITTLE,

[L. S.] *Clerk of the Circuit Court of the United States for the Northern District of New York, in the Second Circuit.*

D. O'BRIEN,
Att'y for Pl'ff in Error, Watertown, N. Y.

73 [Endorsed:] United States Supreme Court. John C. Streeter, plaintiff in error, against The Jefferson County National Bank, defendant in error. Copy. Writ of error. Denis O'Brien, attorney for plaintiff in error, Watertown, N. Y. Allowed. Wm. C. Ruger, ch. J. c't of appeals of the State of New York. Jefferson Co. clerk's office. Filed Jul- 27, 1887.

74 UNITED STATES OF AMERICA, *ss:*

To the Jefferson County National Bank, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the Capitol, in the city of Washington, on the second Monday in October, 1887, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York, in and for the county of Jefferson, wherein John C. Streeter is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19 day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

[L. S.] W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States of America for the Northern District of New York, in the Second Circuit.

Allowed.

WM. C. RUGER,
Ch. J. C't of Appeals of the State of New York.

75 [Endorsed:] United States Supreme Court. John C. Streeter, plaintiff in error, against The Jefferson County National Bank, defendant in error. Copy. Citation. Denis O'Brien, attorney for plaintiff in error, Watertown, N. Y. Jefferson Co. c'k's office. Filed Jul- 27, 1887.

76 To the justices of the Supreme Court of the United States of America:

UNITED STATES OF AMERICA,
State of New York, County of Jefferson, } *ss:*

I, O. De Grasse Greene, clerk of the county of Jefferson, in the State of New York, and clerk of all the courts of record in and for said county of Jefferson and of the supreme court of the State of New York in and for said county, which is in the fourth judicial department of said State, do hereby certify that I find on the files and records of the said Jefferson county clerk's office the record and proceedings, as also the rendition of a judgment of a plea, which is in the said supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, in which suit The Jefferson County National Bank is plaintiff and John C. Streeter is defendant; and I also find the opinion of the said court of appeals, the petition of the said John C. Streeter, by Denis O'Brien, his attorney, for a writ of error to the Supreme Court of the United States; the citation to the Jefferson County Na-

tional bank, allowed by Hon. Wm. C. Ruger, chief justice of the court of appeals of the State of New York; the writ of error allowed by the said Chief Justice Wm. C. Ruger, and the supersedeas bond approved by said Justice Ruger; and I hereby certify that I have compared the foregoing copy — record and judgment rendered on the remittitur from the said court of appeals, remittitur, peti-
77 tion for citation, writ of error, citation, and opinion of court of appeals with the originals on file in this office, and that the same is a true and correct transcript of the said originals on file and the whole thereof.

In witness whereof I have hereunto set my hand and the seal of said courts and county this 4th day of October, 1887.

[Seal Jefferson County, N. Y.]

O. DE GRASSE GREENE, *Clk.*

Endorsed on cover: Case No. 13,627. New York supreme court. No. 409. John C. Streeter, plaintiff in error, *vs.* The Jefferson County National Bank. Filed September 5, 1889.

147 U S 36

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

JOHN C. STREETER,
Plaintiff in Error,
vs.
THE JEFFERSON COUNTY NATIONAL BANK,
Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT.

The above entitled cause comes to this Court on a writ of error to the Supreme Court of the State of New York, Fourth Judicial Department.

An appeal was taken to the Court of Appeals of the State of New York from an order of the General Term of the Fourth Department in said State affirming a judgment rendered in favor of the defendant in error against the plaintiff in error, entered in the Jefferson County Clerk's Office on the 25th day of October, 1882, upon a trial by the Court, without a jury, at the Jefferson County Circuit. The Court of Appeals affirmed the order of the General Term, and its decision was thereupon made the judgment of the Supreme Court of that State. (p. 34.)

The action was brought to recover against the plaintiff in error as endorser upon three promissory notes held by the defendant in error, which are particularly described in the complaint. (pp. 4–6.)

The defendant in error recovered the full amount claimed, and the judgment as entered was for the sum of $3,899.88. The plaintiff in error claims that he is not liable upon these notes, for the reasons alleged in his answer (p. 7) and hereinafter more particularly stated.

There were no conflicting questions of fact upon the trial. The findings of the trial Court are stated at pages 9–12 of the record.

The legal propositions urged by the plaintiff in error were:

1st. That by an unlawful and collusive arrangement made between the defendant in error and the makers of the notes, who were bankrupts at the time, and afterwards adjudged to be such under the Federal statute, and an assignee of their estate appointed, the defendant in error had lost all claim to prove the notes against the estate, or to participate by reason of the existence of said note in the distribution of the bankrupt estate; and,

2nd. That the defendant in error by such collusive arrangement, having discharged the estate of the bankrupt, had also discharged the plaintiff in error, who was the endorser.

It appears by the finding of the Court at page 11, that on or about the 16th of March, 1877, the defendant in error brought suit on the three identical notes set out in the complaint in this action against the makers thereof, the Cadwells, in the Supreme Court of the State of New York, and on the 6th day of April, 1877, recovered judgment thereon for $2,793.90, which was duly docketed in the Jefferson County Clerk's Office; that on the same day an execution

on this judgment was issued against the makers and delivered to the Sheriff of Jefferson County, where the defendants therein resided. That the Sheriff, by virtue of said execution, levied upon the property of the makers thereof, to an amount sufficient in value to satisfy the execution. That on the 6th day of April, 1877, the same day upon which the judgment was recovered, a petition in bankruptcy was filed in the District Court of the United States for the Northern District of New York, against the makers of the note, then residents of the district, and such proceedings were had thereupon that the makers were, on the 1st day of May, 1877, adjudged bankrupts and an assignee of their property was appointed.

The District Court thereupon, by an order to which the defendant in error consented, (p. 29,) enjoined and restrained the Sheriff from proceeding to sell the property levied upon under said execution; and by the same order the Sheriff was appointed special receiver of the estate of the bankrupts, and was directed as such to sell the property levied upon, and to deposit the money received from the sale in the depository of the said Court of Bankruptcy, subject to the further order of the Court.

The Sheriff, as such special receiver, sold the property levied upon, under the direction of the Bankrupt Court, and paid the money arising from the sale into the depository of the Court.

The assignee of the bankrupts, makers of the notes, thereupon, in November, 1877, commenced an action in equity in the said District Court of the United States against the defendant in error, to have said judgment so recovered by said defendant in error against the makers adjudged void and without

legal force and effect as against the said assignee, and that all liens created by the execution issued on said judgment, be vacated and set aside, and that the money deposited by such special receiver be decreed and adjudged to belong to, and to be paid over to said assignee. The defendant in error, who was the defendant in that action, duly appeared in said District Court, answered and made defense to the action, and refused to vacate the judgment obtained, or to release the levy, and no claim was made in behalf of the defendant in error on the trial or in any proceedings in this action, that it had ever paid the judgment recovered against it in the District Court of the United States.

The bill filed against the plaintiff by the assignee of the bankrupts is set forth in full at pages 17–23 of the record.

The assignee, in his bill, charged that the defendant in error, being a creditor of the makers of the notes, with their assent, connivance and procurement, and having reasonable cause to believe the makers to be insolvent, and knowing that a fraud on said act was intended, did commence the said action against the makers and by service of summons and complaint, according to the rules and practice of the Supreme Court of the State of New York, did recover the judgment above described against the makers, and for the same purpose did procure the execution aforesaid to be issued on said judgment, and that thereafter the makers of the notes being insolvent, and in contemplation of insolvency, did procure and suffer their property and goods to be seized on said execution, with intent to give a preference to the defendant in error, and that the Jefferson County National Bank, the defendant in error, which

was a creditor of the makers of the notes, received said preference, and entered into said unlawful and fraudulent transaction, then and there having reasonable cause to believe that the makers were insolvent, and knowing that a fraud on said act was intended. (pp. 18–22.)

It will be seen by an examination of the bill that the defendant in error in this action and the makers of the notes were charged, in various forms, with a fraud upon the bankrupt law. It is also alleged at page 22 (last paragraph) that before the commencement of the action, the assignee demanded of the bank that it surrender its said preference and all benefit derived from said judgment, and surrender any and all liens that it claimed to have by virtue of the judgment and execution, which the said bank refused and still refuses to do, against the rights and equities of the assignee, and also it alleged that such judgment and execution were void and of no legal force and effect as against the assignee, by reason of these facts.

The prayer of the bill, at page 23, asks: "That it be adjudged and decreed by this Honorable Court that the said several judgments aforesaid are void and without legal force and effect, as against your orator, and in fraud of the provision of the said Bankrupt Act, and the creditors aforesaid, on the grounds aforesaid."

The answer to the bill, which is to be found at pages 24–28, distinctly put in issue all these allegations, admitting, however, a refusal to surrender. (p. 28.)

The District Court, upon a trial of the issue, sustained the allegations of the bill, and directed a de-

cree to be entered, adjudging the judgment and execution void as against the assignee (p. 29). The material part of this decree is set out at page 15, in and by which it was adjudged that the judgments and executions mentioned in the bill of complaint (which included others than those on notes endorsed by the plaintiff in error) be and "hereby are decreed to be void as against the complainant, John G. Brown, as assignee in bankruptcy of the estate, property and effects of said bankrupts and that the moneys, to wit, $9,351.50, which arose from the sale of the said property of the said bankrupts by Abner W. Peck, as special receiver of the estate, property and effects of the said bankrupts, belong to, and are hereby decreed to belong to the said complainant, John G. Brown, as such assignee, &c."

The Jefferson County National Bank duly appealed from this decree, and from the decision and opinion therein to the Circuit Court of the United States for the Northern District of New York, (p. 12, finding 24,) and the case having been brought on for hearing in that Court, the decision, judgment and decree of the District Court appealed from were in all things duly affirmed, and judgment of affirmance and for costs was duly entered in that Court on the 15th day of March, 1881. (p. 12, finding 25, p. 16.)

It was admitted that the plaintiff in error was an accommodation endorser of the notes described in the complaint. (p. 16.)

On the trial the plaintiff in error requested the Court to dismiss the complaint on the grounds, among others:

1st. That the defendant in error having obtained

against the makers of the notes, who were primarily liable for their payment, a fraudulent and preferential judgment and levy under the bankrupt law, it thereby precluded itself and the defendant, the endorser, from proving the notes or any part thereof, in bankruptcy against the makers or their estate, or sharing in the distribution thereof on the said notes.

2nd. That the plaintiff, by so dealing with the makers as to preclude itself from enforcing the notes against their property had discharged the endorser, (p. 16.) The Court denied this motion and the defendant excepted.

POINTS.

I.

The allegation in the bill of complaint in the action by the assignee in bankruptcy against the defendant in error, in the United States Court, was, that on the 16th day of March, 1877, and within two months before the filing of the said petition in bankruptcy against the Cadwells, the Jefferson County National Bank, being a creditor of them, the said Cadwells, *with their assent, connivance and procurement*, and having reasonable cause to believe them to be insolvent and *knowing that a fraud* on said Act was intended, did commence an action in the Supreme Court of the State of New York, as plaintiff, against them, the said Cadwells impleaded with Streeter, the plaintiff in error, as defendants, by the service of summons and complaint, according to the rules and practice of said Court, to recover a debt due

from said Cadwells to the said bank, and that such proceedings were thereafter had in said action; that on the 6th day of April, 1877, said bank as plaintiff did recover a judgment against the Cadwells for the sum of $2,770.83 damages and $23.52 costs, which was docketed on that day in the Clerk's Office of Jefferson County, the County in which said Cadwells then resided. (p. 19.) That on the 6th day of April, 1877, an execution was issued upon such judgment, and a levy thereunder was made on the property and effects of the bankrupts, makers of the notes, and property of the value of about $10,000 was taken possession of by the Sheriff of Jefferson County. (p. 21.)

That the said Cadwells then and there being insolvent and in contemplation of insolvency, did procure and suffer their said property and goods to be seized on said execution, with intent to give a preference to said Jefferson County National Bank, a creditor of them, *who had reasonable cause to believe said Cadwells to be insolvent, and who knew that a fraud on said Act was intended.* (p. 22.)

The prayer of the bill of complaint was that such judgment be declared void and without legal force and effect, and in fraud of the provisions of the Bankrupt Act, and that the executions issued thereon and all liens created by virtue thereof and all proceedings thereunder be annulled, avoided, vacated and set aside, and that the goods and chattels and the moneys arising on the sale of the same by the special receiver be decreed and adjudged to belong to the assignee. (p. 23.)

Issue having been joined by defendant in error, as defendant in that action, and a trial of the same had, the Court decreed that the said judgment so re-

covered on the 6th day of April, 1887, by the defendant in error, the Jefferson County National Bank, against the said Cadwells, bankrupts, and the execution issued upon said judgment to the Sheriff of Jefferson County was declared to be void as against the said complainant, John G. Brown, as assignee in bankruptcy of the property, assets and effects of said bankrupts, and that the money that arose from the sale of the property of the bankrupts by the said receiver was decreed to belong to the said complainant Brown, as such assignee in bankruptcy, and that the said assignee was entitled to recover of the said defendant, the defendant in error in this action, his costs and disbursements in that action. (p. 15.) The opinion of the Court upon such trial is found on pages 28, 29. Thereupon this defendant in error, as defendant, appealed from that decree to the Circuit Court, where the judgment of the District Court was affirmed. (p. 12, finding 25.)

(1.) The Bankrupt Act was designed to secure an equal distribution of the bankrupt among the creditors, and any transfer made with a view to secure the property or any portion of it to one, and thus prevent equal distribution, is a transfer in fraud of the Act. When a person has shown his inability to meet his engagements one creditor cannot, by collusion with him obtain a preference to the injury of others. Such an act is a fraud upon the Bankrupt Act, whose aim is to divide the assets equally and, therefore, equitably.

(2.) That the defendant in error in this action procured from the makers of the notes in suit, a fraudulent and preferential judgment, which was forbidden by the Bankrupt Law, cannot be disputed.

That was the very issue tried in the United States

District and Circuit Courts, and that was the fact that was adjudged in the suit between the defendant in error and the assignee of the makers. The allegations contained in the bill filed in the District Court, the answer of the bank, the opinion and decree of the District Court and the decree of the Circuit Court of the United States conclusively establish this proposition, and there can be no dispute in regard to it in this Court. It must be accepted and treated as a fundamental fact in the case.

Brown vs. Jefferson Co. Nat. Bank., 19 Blatch, 333.

II.

The provision of section 5084 of the Revised Statutes of the United States is as follows: "Any person who, since the 2d day of March, 1867, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the Act of March 2, 1867, Chapter 176, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference."

That portion of section 5021 which contains the amendment of 1874, is as follows: "Provided, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this Act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy."

This fraudulent and unlawful preference has never been surrendered by the bank. That it refused to do so is admitted by the answer in the suit by the assignee. "Defendant admits that the plaintiff has demanded a surrender of its rights under said judgments and the lien acquired by such levy of said executions, *which it has declined to do.*" (p. 28.)

It litigated the matter with the assignee in the District and Circuit Courts and was defeated, and then the fund was turned over to the assignee. Final judgment was entered against the bank. The record does not show that anything further was done. Nothing could be done by the parties at this stage of the controversy that could amount to a surrender within the meaning of the statute.

See cases cited in Bump on Bankruptcy, 9th Ed., pages 636, 640.

This Court must take the case as the record shows it to have been when the action was commenced. What has, or might have occurred since is not before the Court for consideration.

The general judicial construction of the word "*surrender*" as is used in the statute imports a voluntary giving up by the creditor to the assignee of

the preference. Then he may prove his debt. But if he chooses to contest the title of the assignee and judgment is recovered against him he cannot prove it.

In re Drummond, 4 Biss., 149.
In re Stephens, 3 Biss., 187.
Blumenstiels Law and Practice Bankruptcy, 334, 5.

III.

The bank cannot, under the provisions of the Federal statute, prove the notes endorsed by the defendant, or the judgment recovered upon them, against the estate of the makers

(*a*) It would seem that the only contention that can possibly arise on that question is as to whether it can prove for a moiety or at all. For the purpose of the question involved in this case it is submitted that it is wholly immaterial whether the holder of the note by reason of its fraudulent act in obtaining a preference is prohibited from proving its *whole* debt or a *moiety* thereof.

The result is just the same in this case. If the holder had by its own acts and dealings precluded itself from proving against the estate of the makers one half the debt, then it has released and discharged his property from all liability to pay that half; and

if the endorser, by the holders acts and dealings with the makers has lost his right to prove the note, that is the whole note and not half of it, against the estate of the maker of the note, then it is submitted that the endorser is discharged in law and in equity. The holder cannot impair the endorsers remedy over against the maker and at the same time hold him liable on the endorsement.

Phelps v. Borland, 103 N. Y., 406.

(*b*) It is respectfully submitted however, that the bank cannot prove the claim, or even a moiety. Since the enactment of the statute in its present form Judge Blatchford has given a clear exposition of the meaning of sections 5084 and 5021 of the Revised Statutes of the United States; in re Alexander Stein, 16 National Bankruptcy Register, page 569, he said: "I see no conflict between the provisions of section 5084 and those of section 12 of the Act of 1874 (now section 5021.) The meaning of the latter section seems to be that although a person taking a preference may be in a position under section 5084 to prove his debt, because he has made a surrender, he shall not even then prove for more than half of his debt if the case is one of actual fraud on his part. Under section 5084 actual fraud is of no consequence if there be a surrender. I see no grounds for holding that there was any intention in section 12 to provide for, or to recognize that there could be any proof of a debt after a recovery, it having been the settled construction under section 5084 that there could be no surrender after a recovery. Section 12 calls its own enactment a limitation on the proof of debts. It is such. It says that a person in a certain position shall not be allowed to prove for more than a moiety of his debt. It does not say that anyone

shall be allowed to prove a debt. The provision in section 5084 is also a limitation on the proof of debts. It says that a person in a certain position shall not prove his debt. Section 12 says that the limitation on the proof of debt shall apply to cases of voluntary as well as involuntary bankruptcy."

(*c*) The statute provides for a recovery back by the assignee where the creditors "had reasonable cause to believe the debtor was insolvent, and *knew* that a fraud on this Act was intended;" and that the person who obtained such preference "in cases of actual fraud on his part" shall not be allowed to prove his debt for more than a moiety thereof. Sec. 5021.

Under the first sub-division of the statute quoted it has been held, that the acts and knowledge of the creditor's attorney who procured the judgment constituting the fraudulent preference, were the acts and knowledge of the creditor himself.

Rogers vs. Palmer, 102 U. S., 263.

In the case at bar, the attorneys employed by the bank to procure the judgments against the bankrupts were the bankrupts attorneys. (pp. 28, 29.)

The attorneys *knew* the purpose of the judgments, to wit: to obtain a preference which was a "fraud on this Act."

The statute, by use of the words "actual fraud," does not mean an act *per see* immoral—because it is not wrong for a creditor to get his own—but the *intentionol* obtaining pay by means of a preference over other creditors in violation of its provisions. The knowledge and acts of the attorneys being imputed to the bank—their knowledge and acts being

the bank's knowledge and acts—the bank must have intended to over-reach the statute, and was, therefore, guilty of "actual fraud."

To call it *constructive* fraud would be to say that a corporation because it is an artificial being, acting through officers, agents, and attorneys, and not possessed of volition, so that it can itself *intend* or *know*, is incapable of committing "actual fraud" within the meaning of this statute. Of course such a conclusion would lead to an absurdity entirely incompatible with the purposes of the law.

(*d*) The sections all read together mean this:

1st. No debt can be proved unless surrender is made of the preference.

2d. Even if surrender is made, still under section 5021, since amended by the Act of June, 1874, there can be no proof but for a moiety in case of actual fraud.

3d. Before the amendment of June, 1874, the whole debt could be proved, even in case of actual fraud, ~~whether~~ where there was a surrender of the preference in time.

13 N. B. R., 225.
In re Currie, 2 Lowell 437.
In re Drummond, 4 Bissell, 149.
In re Leland, 7 Benedict, 436.
In re Parker.
In re Ayers, 6 Sawyer, 248.

IV.

The plaintiff in error, the endorser of the notes, cannot prove them against the estate of the maker, as he is prohibited from proving on the same grounds, and for the same reason that the defendant in error is. To allow the plaintiff in error to prove a debt which the defendant in error is prohibited from proving would defeat the very object of the law. It would offer a premium to fraudulent practices. By obtaining the unlawful preference the creditor *may* retain it and then save his entire claim. If it be set aside he is in no worse plight than if he had not attempted to violate the law; no penalty comes for disobedience. If the endorser can prove the debt it must be for the benefit of the holder. There can be no reason for allowing him to prove it, except for the purpose of receiving and paying over the money to the bank. We submit that the law is settled upon principle and authority that in case where the holder of an endorsed note takes a fraudulent preference from the maker, and the holder is thereby prohibited from proving the note in bankruptcy against the maker, the endorser is likewise prohibited. In other words, the endorser is entitled to prove the note only in cases where the holder is or would be so entitled. To prohibit the holder and at the same time permit the endorser to prove would be absurd.

V.

Therefore, in such cases it must be held that the endorser is discharged from all liability to the holder of the note.

Whether the question is examined in the light of the principle laid down by the United States Courts, drawn from the peculiar provisions of the Bankrupt Law, or tested by the general principles of law applicable to the relations of principal and surety, the result is the same.

In *Bartholow* vs. *Bean*, 18 Wallace, 635, the principle here contended for is decided by the Supreme Court of the United States. Justice Miller, delivering the opinion, says at page 641: "It is, therefore, very evident that the statute did not intend to place the endorser or other surety in any better position in this respect, than the principal creditor."

Again, at page 642, the Court says, "that, by receiving the money, the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, *and loses his right to recover, either of the endorser or of the bankrupt's estate.*"

In re C. B. Ayres, 6 Bissel, U. S. Circuit Ct. Reps., p. 48, is precisely in point. This was a motion to expunge the proof of debt in a claim presented. It appeared that within four months prior to the bankruptcy, the bankrupt made a bill of sale of his lumber to one Giles, to pay, or secure the payment of three notes Giles had against the bankrupt. The assignee brought suit in the United States Court against Giles for the recovery of the property, on the ground that the sale was illegal, as constituting

a preference contrary to the provisions of the bankrupt law. The transfer took the form of a bill of sale. The assignee recovered judgment against Giles which he paid. The guarantors on the notes held by Giles proved them in bankruptcy, amounting to $2,049.00.

The motion to expunge was made by the assignee upon the ground that as Giles, the holder of the notes, could not prove his claim, on account of his part in attempting to gain a preference, the guarantors of the notes could not do so.

Hopkins, J., after stating that Giles, the holder of the notes, could not prove them, and that payment by him of the judgment was not a "surrender," proceed as follows: "If the guarantors or endorsers may prove the debt or claim in such cases, notwithstanding the fraud of the holder, this provision of the law may be wholly avoided and rendered nugatory." But the Supreme Court of the United States, in the case of *Bartholow* vs. *Bean*, 18 Wall., 635, recently decided, have laid down a proposition which I think must control this case. Justice Miller, who delivered the opinion of the Court, says: "It is very obvious that the statute intended in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or endorser, from the right to receive payment from the insolvent maker or bankrupt. It is forbidden. It is called a fraud upon the statute in one place, and an evasion in another. After stating that the holder of endorsed paper might refuse a tender of payment, and that such refusal would not exonerate the surety or endorser, because in refusing, he would be obeying the plain mandate of the bankrupt law, he says, 'by receiving the money the holder of the note makes

himself liable to a judgment for the amount in favor of the assignee of the bankrupt *and loses the right to recover, either of the endorser or of the maker.*' The italics are my own, made because of the great importance of the principle included and enunciated in that clause. That case, as I have before said, would seem to dispose of the question involved in this motion, for if the holder of a note forfeits his claim, as against the sureties, by his fraud upon the Bankrupt Act, then these guarantors are not, or would not be legally liable to Mr. Giles, and do not occupy the position of parties who are authorized, under section 19, to prove their debts, as they are not liable as bail, surety, guarantors, or otherwise, for the bankrupt; so that giving to the language of the opinion above italicized, its obvious meaning, this motion must be granted, for the facts of the case clearly bring it within the doctrines there announced. * * * But it will be seen that section 19 authorizes parties liable for the debt of a bankrupt, who have not paid the same, or any part thereof, to prove such debts, only when the creditor shall fail or omit to prove them."

"It would be an unwarrantable construction to give to these words, it seems to me, to hold that they covered the case of a creditor who had forfeited the right to prove the debt by his own fraudulent acts. The doctrine enunciated in the opinion of the Supreme Court is not by any means new. It is only a new application of the old rule that every act of the creditor which extinguishes his remedy as against the principal absolves the surety, guarantor or endorser."

The claim was expunged and the proof of the debt stricken from the record.

These decisions in the Supreme and District Courts of the United States, upon a provision growing out of the provisions of an Act of Congress are entitled to great weight, especially as they enunciate very clearly the precise doctrine asserted by the plaintiff in error in this case.

The precise question involved in this case has been decided by the Court of Appeals of the State of Kentucky in accordance with the contention of the plaintiff in error in this case.

See Northern Bank of Kentucky vs. Cook, 13 Ky., Rep., Bush, 340.

An examination of that case will show that it was the unanimous opinion of the Court that a fraudulent preference secured by the holder of the note precluded him from proving it against the maker, and that the surety or endorser was thereby discharged; and it was also held that a judgment in favor of the assignee in bankruptcy against the creditor, thus obtaining fraudulent security, established *conclusively* that the preference was accepted with implied notice of the bankrupt's insolvency and of his intention to defraud the Bankrupt Act. The Court also examined and criticised at page 33 the case of Watson vs. Pogue, (42 Iowa, 582) and stated very satisfactory reasons why it should not be followed. It must be borne in mind that a suit and a recovery by the assignee against a creditor who has taken a preference is no surrender, and a creditor who retains property or preferential security until *forced* to give it up by suit, seeks to avail himself of the benefit of what before only made constructive fraud, conclusively makes himself a party to whatis tantamount to actual fraud, in which case, upon any construction of

the statutes, he can prove for one-half his claim only.

When the pleadings in the case of Brown, assignee vs. The Jefferson County National Bank are examined, it will be seen that the bank was charged with conspiracy to obtain an unlawful preference over the other creditors, which was carried to completion by the failure of the other creditors to act; the delay in doing which was caused by the misrepresentation and denials of the attorneys of the bank; there was no mere passiveveness or innocence on the part of the bank, but an active procuring of the property of the debtor with the intent of obtaining it for its own indemnity, and after full knowledge of all the facts, (assuming it was not possessed of them at the outset,) ratified the acts of its attorneys, struggled to the end of the law to retain its unlawful preference. Within the scope and meaning of the bankrupt law this constitutss fraud.

It does not appear that the bank ever paid the judgment recovered against it by the assignee, neither is there any proof in the record, (which must be considered as it is) that it has ever proved or attempted to prove its debt against the bankrupts.

The general principles of law as enunciated by many Courts, establish the legal proposition

The case of Lynch vs. Reynolds, 16 Johnson, 40, is in point, and in effect decides the principle contended for, and deserves to be studied carefully in connection with this case.

At the end of the opinion the general principle is stated thus: "The holder of a dishonored note may be passive, after having fixed the several parties by

demand and notice, and he may receive partial payment without effecting his remedy against all the parties; *but if he does an act which takes away and destroys the remedy of the other parties against the maker, upon the very bill. he forfeits the right to call on the prior endorser.*" And the Court there calls this a "salutory rule."

See also Willson's case, 11 Vesey, 410.

In Brown vs. Williams, 4 Wendell, 360, the rule is stated thus:

"The maker of a promissory note, when nothing appears to the contrary, is considered the principal debtor and the endorsers are sureties. * * * Suppose he (the holder) has a written guaranty from a third person that the maker shall pay his note, and he covenant not to sue such maker, can he be permitted to prosecute on his guaranty, after he has covenanted that the maker shall not be compelled to pay? The law, I trust, does not tolerate such injustice. It will not permit him to do indirectly what he has covenanted not to do directly. If he may be permitted to recover of the surety, he (the surety) must have his remedy against the principal, who will thus be compelled to pay where the creditor had covenanted that he would not be so compelled. It will hardly be contended that the surety shall pay and yet have no remedy against the principal. * * * * If the creditor, by agreement with the principal debtor, without the sureties consent, has disabled himself from suing, when he would otherwise be entitled to sue, under the original contract, or has deprived the surety, on paying the debt, from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged."

Germania Bank vs. Frost, 43 N. Y., Superior Court Reports, 117, is also in point. The Court said, at page 124: "It is well settled that a creditor cannot, without the consent of the endorser, by any agreement with the maker of the note, change, as in this case, the original contract, *or effect the remedies of the endorser against the maker, without discharging the endorser;* nor has the creditor the right to release and discharge the collateral security and collect from the endorser what should have been paid out of the property of the maker who is primarily liable."

It is therefore submitted that the act of the bank, in procuring a fraudulent preference from the makers of the note, thereby precluding itself from sharing in the distribution of the bankrupt's estate, has discharged the endorser.

Shults vs. Finigan, 100 N. Y., 543–545.

VI.

It will be seen by the record in this case that the bank not only obtained a judgment against the makers of the notes, but had, through the sheriff, obtained a levy on their property which was sufficient to pay the debt; but by its attorneys, appeared in Court and *consented* to release the property from the levy of the sheriff, as such, and converted him

into an officer of the Bankrupt Court, and discharged the lien of the execution, (p. 29.)

This was done without the consent of the endorser and it is respectfully submitted that, irrespective of the question hereinbefore discussed, discharged the endorser. "It is a question fit to be tried at law, whether, if a party takes out execution on a bill of exchange and afterwards waives that execution, he has not discharged those who were sureties for the payment of the bill. The principle is that he is a trustee of his execution for all parties interested in the bill" per Lord Eldon.

Mayhew vs. Crickett, 2 Swanst, 190.
Byles on Bills, (*) 195.
Brandt on Suretyship, § 379, and cases cited.

Without the consent of the bank, the sheriff had no right to surrender the property upon which he had ~~no~~ levied and remand the funds to another jurisdiction.

National Bank & Loan Co., of Watertown, vs. Babbitt, 17 Hun, 447.
Ansonia Brass & Copper Co. vs. Babbitt, 74 N. Y., 395.
O'Brien vs. Weld, 92 U. S. R., p. 83.
16 Wall., 551; 14 Wall., 419.
Decker vs. Rapp, 67 N. Y., 464.

The case of Gardner vs. Oliver Lee & Co's Bank, 11 Barb., 558, decides a principle somewhat similar to the one here involved. In that case it was held that where the holder of a bill proved it under the insolvent law of Massachusetts, by so doing, under the laws of that State, the future acquisitions of the maker could not be reached; that the act of proving the debt discharged the endorser, because upon taking up the bill, if he might be defeated in a suit by

him against the maker, by reason of the proceedings in the insolvent Court, to which the holder voluntarily became a party, the endorser ought not to be held liable on his endorsement. This case is followed and approved in

Phelps vs. Borland, 103 N. Y., 411.

VII.

Aside from the questions of surrender and right of the bank to prove its claim against the bankrupt's estate, it is submitted the endorser is discharged by reason of the changed relations brought about by the acts of the holder of the notes.

(*a.*) The bank fraudulently procured judgment on the notes, and when requested so to do, refused to surrender its unlawful preference. While in this position, by its own wrongful act, it disabled itself from proving its claim against the bankrupt's estate, because it could not hold on to its judgment and execution, and proceed in the Bankruptcy Court at the same time, § 5084 bars the way; nor could the endorser have taken up the notes and proved them against the bankrupts' estate. He could only be subrogated to the rights of the holder. The time of payment was thus extended, which, by the unquestioned rule of law as to commercial paper, discharges the endorser.

Story on Notes, Secs. 412–414.
Daniel on Neg'le Ins'ts, Secs. 1312–1313.

Accordingly it has been held in a suit against the drawer and endorser of a bill of exchange which stood for trial at an approaching term, an agreement between the attorney and agent of the holder that it should be continued without judgment until the term after the one approaching if the drawer would permit a person in confinement under an execution at his suit to attend a distant Court as a witness for the holder, was an agreement for a valuable consideration and a virtual discharge of the endorser.

Bank of U. S. vs. Hatch, 6 Peters, 250.

Also an agreement to pay yearly interest on a demand note.

Gifford vs. Allen, 3 Met. (Mass.) 225.

See as to discharge of surety by giving time.

Decker vs. Rupp, 67 N. Y., 464.
Pomeroy vs. Tanner, 70 N. Y., 547.

This extension of time may have wrought injury, by reason of the maker's changed condition; but whether it so operated is immaterial. The endorser had a right to stand upon *the very terms* of the contract.

Martin vs. Thomas, 24 How., 315.
Price vs. U. S., 9 Wall., 13.

(*b.*) When the bank recovered judgment against the makers of the endorsed notes, the makers were insolvent. (See bill, pp. 18, 24, and finding, p. 12.)

Creditors could not then get *all* their pay. The suit by the assignee to set aside the judgment so fraudulently obtained took time—added to the endorser's liability an increased amount of interest, and presumptively caused large expense to the bank

rupt's estate—thereby diminishing the dividend (if any) to which it was ultimately entitled, leaving undiminished the sum the endorser must pay, and which he otherwise would have had credited on the note. All this arose from the unlawful act of the bank, and produced a wide departure from the original contract.

It can not be supposed that the holder of a note may so deal—and as in the case at bar *unlawfully* deal—with the maker of a note to the endorser's prejudice, and still retain his right to compel pay ment by the latter.

Any dealings with the principal by the creditor which amount to a departure from the contract by which the surety (accommodation endorser) is bound and which by possibility might vary or enlarge his liabilities, operate to discharge the surety.

Ludlow vs. Simond, 2 Caines' Case., 1.
Miller vs. Stewart, 9 Wheat., 703.
U. S. vs. Boecker, 21 Wall., 652.
Brandt on Suretyship, Sec. 345, and cases cited.

(*c.*) Nor is it material that the deviation from the contract worked no injury to the surety.

"I can not try the cause by inquiring what mischief it may have done, for that would go into a vast variety of speculation upon which no sound principle could be built." Per Lord Eldon.

Rees vs. Barrington, 2 Vesey, Jr., 540–542.

See also

Martin vs. Thomas, supra.
Price vs. U. S., supra.

VIII.

The Courts below held that the property seized under execution, and its proceeds having been taken out of the possession of the bank and turned over to the assignee in bankruptcy by the decree of the District Court, the transaction amounted to a surrender and in support of such proposition cite, *In re Black*, 17 N. B. Reg., 399. *In re Riordan*, 14 Id., 332. *In re Newcomb*, 18 Id., 85. *In re Schoonenberger*, 15 Id., 305.

It is respectfully submitted that the General Term erred in this conclusion.

The question at issue in the District Court was determined adversely to the bank.

The decree of the Court was that the *judgments were void*, and the opinion of the Judge upon the trial of the case in the District Court declares a few of the facts that led to the judgment of the District Court, to wit: That the attorneys of the bankrupts were employed to obtain the judgment in favor of the bank, and thus the law presumed that the knowledge the attorneys for the bankrupts possessed was disclosed to the bank, (p. 29.)

It further appeared that the very day the judgment was obtained and levy made, the petition in bankruptcy was filed.

In re Black, *supra*, the Court merely determined that the amendment of 1874 was applicable to a case where the preference was given prior to the amendment, and was applicable to voluntary as well as involuntary bankruptcy, and that in that case there was no actual fraud in the compromise, consequently the creditor could prove for a moiety of the debt.

In re Riordan, supra. In that case there was an actual surrender of the amount of money received and alleged as a preference by Thurber & Co., and the assignee, before any decree entered or a closing of the trial, the action commenced by the assignee was discontinued by him and he gave a receipt for the amount of money surrendered to him. The Court held that the preference having been surrendered *before a recovery*, accepted by the assignee and the action having been voluntarily discontinued by the assignee, that the assignee was estopped from alleging that there was no surrender; having waived a recovery, he waived the right to exclude the proof of debt, and the proof of debt was allowed.

The Court upon the question of "actual fraud" said: "I do not think that the provision of the amendment of 1874, in regard to proving a debt by a creditor, in case of "actual fraud" on his part, applies to any other case than where there is a recovery."

In the case at bar a recovery was had.

In re Newcomb, supra, is in conflict with some decisions of the Court and especially decisions prior to the amendment of 1874, in holding that payment of the judgment recovered against a preferred creditor operates as a surrender of the preference. There is no claim that the judgment in the case at bar was ever paid.

In re Schoonenberger, supra, was a case of the *voluntary surrender* of the preference, and the creditor was permitted to prove the debt; but the Court held that if creditor had knowledge of insolvency of debtor, and fraud on the act was intended, only a moiety could be proved.

The judgment of the District Court established actual fraud on the part of the bank. By collusion with, and assent of, the bankrupts, the preference was obtained, and after it was asserted to be fraudulent, the bank insisted in maintaining the contrary, and not until the end of the limit to review in the U. S. Court, did the judgment recovered by it cease to be of effect. There was not a surrender in any sense of the term. The commencement of the actions in Supreme Court was an admission of knowledge on the part of the bank of reasonable cause to believe the debtors insolvent, and that action was commenced and prosecuted by the attorneys of the bankrupts with the view of securing the bank a preference. Such proceeding was held to be fraudulent, and who was more active in actually carrying it into effect than the plaintiff?

IX.

The judgment should be reversed, and as no questions of fact are involved, the complaint dismissed.

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Watertown, N. Y.

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In Supreme Court

OF THE UNITED STATES.

JOHN C. STREETER,
Plaintiff in Error,
ag'st
THE JEFFERSON COUNTY NATIONAL BANK,
Defendant in Error.

Points for Defendant in Error

In Error to the Supreme Court of the State of New York, from a judgment entered on remittitur from the Court of Appeals of the State of New York affirming a judgment on order of the General Term of the Supreme Court of the Fourth Judicial Department of said State, affirming a judgment entered after trial at Jefferson Circuit before Justice Vann without a jury.

STATEMENT.

The action is brought on three promissory notes made by H. V. Cadwell & Co., payable one month after date respectively, to the order of H. V. Cadwell & Co., at the Jefferson County National Bank, and endorsed by the defendant, John C. Streeter, as endorser, dated respectively 24th January, 1877, 7th Feb., 1877, and 12th Feb., 1877, (pages 9, 10.) The said notes at their dates respectively, were transferred to the plaintiff, who is now owner, (page 10.) The

notes were not paid at maturity and were thereupon duly protested for nonpayment and notice duly given to the defendant, (pages 10, 11.) The notes have not been paid, (pages 10, 11.) On the 6th April, 1877, the plaintiff recovered a judgment against the makers of the said notes for the amount thereof, (page 11.) An execution was thereupon issued and the sheriff levied upon sufficient property of the defendants in the execution to more than satisfy the execution, (page 11.) On said 6th day of April, 1877, a petition in bankruptcy was filed in United States District Court against H. V. Cadwell & Co., the makers of the said notes, (page 11.) On the 9th day of April, 1877, the Jefferson County National Bank and the sheriff were enjoined from selling the property levied upon by the execution issued as aforesaid (page 11) by order made by the said District Court, (page 30.) On the 1st May, 1877, the said Cadwells were duly adjudged bankrupts, (page 11,) and an assignee was subsequently appointed. On the said 1st day of May, the sheriff was duly appointed by the Court in bankruptcy, special receiver of the estate of the bankrupts, and directed to sell the property levied upon and deposit the proceeds in the depository of the said Court, subject to the further order of the Court, the lien of the judgment creditors not to be affected thereby, (pages 11, 29.)

The sheriff, as such special receiver, sold the property levied upon and deposited the proceeds in the depository, as directed by the order, (page 11.) The assignee of the bankrupts in November, 1877, commenced a suit in the said Court of Bankruptcy to have the judgment recovered by the plaintiff aforesaid adjudged void as against such assignee, and that the money deposited in the depository by such

sheriff be adjudged to belong to and be paid to said assignee, (pages 11, 12.) The Jefferson County National Bank defended the same, (page 12.) The suit was tried and a decree made therein on 30th March, 1880, adjudging that the said judgment and execution were void as against the assignee of the bankrupts, and that the money deposited in the depository belonged to said assignee, (page 12.) An appeal was taken from that decree to United States Circuit Court, and the same was there affirmed, (page 12) and the money deposited in the depository was thereupon paid to said assignee, (page 12.) The plaintiff in this action never received anything from the sale of the property levied upon, and never realized anything from the judgment recovered as aforesaid, against the Cadwells, (page 12.) The defendant at the close of the evidence, moved to dismiss the complaint on the ground that the plaintiff had obtained against the makers of the notes, a fraudulent and preferential judgment and levy, and it thereby precluded itself and the defendant from proving the notes or any part thereof, in bankruptcy against the makers estate and thereby released the defendant as endorser, (page 16.) The motion was denied and judgment was ordered for the plaintiff, (page 16,) which judgment was affirmed by the General Term, which was on appeal affirmed by the Court of Appeals. From the judgment entered in the Supreme Court on such affirmance of the Court of Appeals this action is brought into this Court by writ of error.

There was no finding by the trial Court that the bank had been guilty of fraud in the recovery of the judgment against the makers of the notes, nor any request to find such fraud, (page 16.)

POINTS.

I.

By the recovery of the judgment by the defendant in error against Cadwells, the makers of the notes, and the execution and levy on the goods of the makers, which judgment and levy was subsequently by the decree of the District Court, decreed to be void as against the assignee of the bankrupts as a fraudulent preference, the defendant in error was not precluded from proving the notes as against the bankrupt estate.

The prohibition against proof of debt by any person who has accepted a preference is contained in section 23 of the original act.

Any person who since the 2nd of March, 1867, has accepted any preference having reasonable cause to believe the same was *made* or *given* by the debtor contrary to any provisions of the act of March 2, 1867, to establish a uniform system of bankruptcy or to any provisions of this title, shall not prove the debt or claim on account of which the preference is *made* or *given*, nor shall he receive any dividend therefrom until he shall have surrendered to the assignee all property, money, benefit or advantage received by him under such preference.

14 U. S. Statute, at page 528, Section 23,

and reads substantially as it does in the Rev. Statute of U. S.

R. S. of U. S., Sec. 5084.

This section clearly applies to a *case* where a creditor accepts a preference, having reasonable cause to

believe that the same is given contrary to the provisions of the bankrupt act.

Here there is no acceptance of a preference. The plaintiff recovered a judgment in an action commenced in due form, and in due course of proceeding execution was issued and levy made.

There was no actual knowledge by the Bank or its officers that the bankrupts had done anything whatever to facilitate the procurement of the judgment. They did nothing to facilitate the recovery of the judgment. It was recovered in due course of legal proceedings and without any aid from the bankrupts.

There was no acceptance by the Bank of any security which the bankrupts had given them They only obtained what the law in due course gave them. There was no arrangement or collusion between the Bank and the bankrupts, by which the Bank obtained any preference.

So that it cannot be said that the Bank accepted a preference from the bankrupts.

As the Bank and its officers did not know of any act of the bankrupts which the Court had determined was in aid of the preference gained, the plaintiff cannot be said to have accepted. A party cannot accept or reject a benefit until he knows of it and an opportunity is given for election.

There is no evidence in this case that the Bank had reasonable cause to believe that the judgment or preference was made or given by the bankrupts contrary to the provisions of the bankrupt act.

This case does not come within the provisions of

section 5084, as there was no acceptance of a preference and no reasonable cause to believe that the same was made or given contrary to the provision of the act.

It differs widely from the taking of security by way of mortgage or transfer of property or payment of a debt by the bankrupt. In such case the creditors accept the preference. In this case the creditor did not accept and had no opportunity to accept, it merely took such steps as the law pointed out as its right and remedy.

The prohibition against proof of debt by a creditor who has had transferred to him property was also contained in section 39 of the original act, which provided that if the creditor had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent, he should not be allowed to prove his debt in bankruptcy.

The first portion of the section provides for cases in which a person may be declared a bankrupt, and the final clause provides: "And if such person shall be adjudged a bankrupt, the assignee may recover the money or other property so paid, conveyed, sold, assigned or transferred contrary to this title *provided* the person ~~receiving~~ receiving such payment or conveyance had reasonable cause to believe that a fraud on this title was intended and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy."

14 U. S. Statute at Large 536, Sec. 39, at end.

This section of the bankrupt act was incorporated in the Revised Statute of the United States, and became section 5021. In 1874 this section of the bankrupt act was amended, so that it provided that if the

creditor had reasonable cause to believe that the debtor was insolvent and knew that a fraud on the act was intended, he shall not in cases of *actual fraud* be allowed to prove for more than a moiety of his debt.

Provided that the person ~~recovering~~ receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in case of *actual fraud on his part*, be allowed to prove for more than a *moiety of his debt.*

1 Vol. Supplement to R. S. of U. S., p. 72.

There was no finding by the trial Court that the Bank had reasonable cause to believe that the debtors —the makers of the notes—were insolvent, and knew that a fraud on the bankrupt act was intended, nor any finding that the Bank was guilty of actual fraud, nor any evidence in regard to it given, nor any request to find such knowledge or fraud, (findings of the Court, pages 9–12) and request to find, (page 16.)

In the action brought by the assignee in bankruptcy against the Bank in the District Court there was no evidence of *actual fraud* on the part of the Bank given. As appears by the opinions both in the District and Circuit Courts, no such evidence was given in those Courts. The fraud was *constructive.* The bank is made liable for the knowledge of its attorney.

Opinion District Court, Exhibit C, page 28.
Opinion Circuit Court, 19 Blatch 315.

As there was no actual fraud there is no reason why, under this section, the Bank should not prove the whole of its claim, and under any circumstances

it has the right to prove the moiety under this section.

In the District Court of Mass., Judge Lowell held that a preferred creditor, after a recovery of the damages and costs by the assignee in bankrupty, if *not guilty of actual fraud* in the transaction, might prove his debt for the whole amount. He holding that the amendment of 1874 was a virtual repeal of section 5084 of the R. S. of U. S., except in cases of actual fraud. That it limited such section and made a change of it so that in case of actual fraud there could under any circumstances be proof for a moiety.

In re Black, 17 N. B. Reg. 399. See also
In re John Reorden, 14 N. B. R., 332.
Bump on Bankruptcy, 9 Ed., 96 and seq.

The act of 1874 repeals all acts and parts of acts inconsistent with it.

1 Vol. Supplement to R. S. of U. S., page 76, §21.

Where the assignee recovered a judgment against a creditor for the value of goods taken by him prior to bankruptcy, in payment of his indebtedness, and the creditor paid the amount of such judgment and costs, it was held that in the *absence of actual fraud such payment was a surrender* and such creditor could prove his whole debt.

In re Newcomer, 18 N. B. R., 85.

See also

In re Joseph Schoenenberger, 15 N. B. Reg., 305.

No case can be found where a creditor in due course of legal proceedings. has recovered a judg-

ment and obtained a levy on the property of the bankrupt, but before he has received the money or the fruits of his judgment and levy, the assignee in bankruptcy has obtained the same, in which it has been held that such creditor could not prove the whole of his debt.

Here the Bank never received any of the proceeds of the levy. Never received any preference. It is clearly not within either of the sections cited. The Bank has not accepted any preference, in fact it has not had any preference, so that it can not be within the provision of section 5084.

No payment or conveyance has been received by the Bank, so that it can not be within the provision of section 5021.

Since the trial and decision of this action at Circuit, the District Court of the United States has in this very case of H. V. Cadwell & Co., bankrupts, on an application for proof of debt by the defendant in error on other notes made by H. V. Cadwell & Co., and endorsed by other parties, held that the Bank was entitled to prove its debt in bankruptcy.

This decision is by the Court having sole jurisdiction of the matter, and is conclusive.

On the decision of the case the District Court delivered the following opinion:

United States District Court
Northern District of New York.

IN BANKRUPTCY.

IN THE MATTER OF HENRY V. CADWELL and others, *Bankrupts.*	*No. 5376.*

George W. Adams, for the Assignee.

John Lansing, for the Creditor.

COXE, J.

This is an appeal from an order of the Register, expunging the proof of debt filed by the Jefferson County National Bank, founded upon three judgments which had previously been declared preferential and void, for constructive fraud only.

Brown, Assignee, vs. Jeff. Co. Nat. Bank, 19 Blatch., 315, S. C., 9 Fed. Rep., 258.

The sole question is whether a creditor, who is guilty of no actual fraud, is debarred from proving his debt for the reason that his preference has been set aside by the judgment of the Court. In August 1877, Judge Blatchford, at that time Judge of the District Court for the Southern District of New York, decided that there was no conflict between Sec. 5084 of the Revised Statutes and Sec 12 of the act of June 22d, 1874. That a person surrendering his preference under section 5084 may even then, under section 12, be prevented from proving more than a moiety of his debt, if guilty of actual fraud. That Sec. 12 placed another limitation upon the proof of debts and did nothing more. In other words, that the amendment, instead of relaxing made still harsher the terms of the original act. *In re* Stein 16 N. B. R., 569.

The Register rests his decision wholly upon this authority.

I find but one case decided subsequently, in which a similar view is taken. *In re* Graves, 9 Fed. Rep., 816, Dist. Court of Delaware, 1881.

See also, *In re* Cramer, 13 N. B. R., 225, District Court, Minnesota, 1876.

On the contrary, the following authorities—two of them Circuit Court decisions—held that it was the intention of Congress, by the amendment of 1874, to distinguish between actual and constructive fraud, and remove every other limitation upon the proof of debts by honest creditors. Barr vs. Hopkins, 12 N. B. R., 211. Cir. Court, Wisconsin. *In re* Black, Currier, et al, 17 N. B. R., 399, Dist. Court, Massachusetts, 1878. *In re* Newcomer, 18 N. B. R., 85, Dist. Court, Illinois, 1878. *In re* Kaufman et al., 19 N. B. R., 283, Dist. Court New Jersey, 1879. *In re* Reed, 3 Fed. Rep., 798, Cir. Court, Massachusetts, 1880.

All of these decisions, with the exception of the first named, were rendered after the decision in the Stein case. The reasoning of the learned Judge in that case is referred to, reviewed and disapproved.

The construction contended for by the assignee, is, with great unanimity rejected. It would hardly be profitable to enter upon an extended discussion of the arguments *pro* and *con*, they are very clearly and ably stated in the opinions referred to. The question is not free from doubt, each interpretation is surrounded with difficulties, but I am inclined to concur in the views expressed by Judges Drummond, Lowell, Blodgett, Nixon and Clifford, as giving the most reasonable construction of the law.

If the amendment had been stated affirmatively, "and such person, if a creditor, shall, except in cases of actual fraud on his part, be allowed to prove * * his debt," there would be little difficulty in giving it force and effect, even though in conflict with some of the earlier provisions of the act. But is not the meaning the same, though the proposition is stated negatively? The law says that a guilty party shall "not be allowed to prove for more than" half his debt; is not the implication well nigh conclusive that an innocent party may prove his entire debt? If this is not the meaning of the amendment it is indeed difficult to imagine what the intention of Congress was in adopting it.

The order of the Register should be reversed, and the expunged proof reinstated. This case was appealed from the District Court to the Circuit Court, and was affirmed by the Circuit Court of the Northern District of New York, Judge Wallace, presiding, Jan. 27, 1885, no opinion was delivered.

II.

The Bank not having deprived itself of the right to prove its claim against the bankrupt estate, has not deprived the endorser of the right he has as such to prove the claim.

The Bank was not bound to prove the claim against the bankrupts. The endorser had the right to have

paid the notes and then proved them against the bankrupt estate, or he might have proved the debt in the name of the Bank, or therwise, when the Bank omitted so to do.

R. S. of U. S., Sec. 5070.

III.

Even if the Bank had by its acts deprived itself of the right to prove the claim against the bankrupt's estate, that did not and could not in any maner affect the right of the endorser to prove such claim as such endorser.

The Bank, as holder of the notes, was under no obligation to the endorser to collect the notes from the makers, or from the estate of the makers, after their bankruptcy. The Bank was not bound at the request of the endorser to collect of the maker or his estate; it had the right to refuse and decline to collect of the makers even at the request of the endorser to do so.

Smith vs. Erwin, 77 N. Y., 466–470.
Shutts vs. Fingar, 100 N. Y., 539–544.
Parker vs. Stroud, 98 N. Y., 379.

An endorser, although in the nature of a surety, is not for all purposes entitled to the privilege of that

character. He is answerable upon an independent contract, it is his duty to take up the note when it is dishonored. In some respects there is a resemblance between an endorser and a surety, in others there is none.

Bradford vs. Cory, 5 Bar., 462–3.
Trimble vs. Thorn, 16 John., 152–155.
Beardsley vs. Warren, 6 Wend., 610.
S. C. affirmed 8 Wend., 194.
Converse vs. Cook, 25 Hun, 44.
Converse vs. Cook, 31 Hun, 417.
Powers vs. Silberstein, 19 Jones & Spencer, 321–324.
Newcomb vs. Hale, 90 N. Y., 326–330.
Cardell vs. McNiel, 21 N. Y., 336.

A request by the endorser to sue and collect, and neglect by holder to do so, is no defense to the endorser.

Hurd vs. Little, 12 Mass. 582.
Pitts vs. Congden, 2 Comst. 352.
Wells vs. Mann, 45 N. Y., 327–330.
Colgrove vs. Tallman, 67 N. Y., 99 and cases cited.

As the endorser here could not compel the Bank to have proceeded against the bankrupts to collect of them, either by suit or by proving the debt in bankruptcy against their estate, and in default set up such facts as defense to action brought against him on the notes, so if the Bank has so conducted itself that it has no right to prove its debt against the bankrupts' estate, it has not injured the endorser or deprived him of any right that he had, because he had no right to compel the Bank as holder to proceed to collect of the bankrupts' estate. The plaintiff in error is an endorser, not a surety, if a surety that

right he would have had but not as endorser, as shown by the cases cited above. The distinction between sureties and endorsers is broadly shown in *Converse vs. Cook supra.*

Although the plaintiff in error was an accommodation endorser for the makers, yet his endorsement as to the Bank was his independent contract of endorsement upon and for the consideration of a loan of money made thereon and on the credit thereof. The theory is that Bank loaned the money on the contract of an endorser, and not the collateral agreement of a surety.

When the lien that the Bank had gained by virtue of the execution and levy on the property of the bankrupts was adjudged to be void and set aside, the Bank was remitted to the rights which it had before the execution and levy the same as if it had never existed; and at the same time any rights which it had lost as against the plaintiff in error as endorser were restored. But by the recovery of the judgment and execution and levy it had lost no right against the plaintiff in error. It was not bound to have proceeded against the defendants in the execution; it might have suspended its proceedings against the bankrupts and resorted to the plaintiff in error for the satisfaction of the debt.

It was the duty of the endorser to have taken up the note when it became due, and because the holder saw fit to proceed first against the principal debtor, the endorser did not thereby acquire any right to require the holder to proceed to satisfaction. It might stop at any time and proceed against the endorser.

A creditor of bankrupt does not by consenting to a resolution for a composition under U. S. statute of

June 22, 1874. Sec. 17, release a person liable as surety for the same debt.

Gould vs. Butler, 122 Mass., 498 and cases cited.
S. C., 23 Am. R., 378.
Liebke vs. Thomas, 116 U. S. 605.
Baylies on sureties and guarantees, p. 276, Sec. 21 and cases cited.

Gould vs. Butler is an example of the change which the bankrupt act has made in reference to the rights of different parties to obligations. A change from the common law. Such a composition would have released the surety at common law. In Bartholomew vs. Bean, 18 Wall., 635–642, such a change is recognized. The Court in that case say that the holder of a note had a right under the circumstances of that case to refuse to receive payment of the same, and if he did so the endorser would not be released.

In England it has been held that when a preferential payment has been recovered of the holder of a note by the assignee of the bankrupt, the holder could resort to the endorser or surety and that such payment was no defense.

Pritchard vs. Hitchcock, 6 Manning & Granger, 151.
Petty vs. Cooke, 6 Law R. Queen's Bench, 789.
Nerington vs. Day, 5 Law R. Common Bench, 606, 612.

The same has been held in the Supreme Court of Iowa, in January, 1876.

Watson vs. Poagae, 42 Iowa, 582, S. C., 15 N. B. R., 473.

The cases above cited, as also the cases cited on

the part of the plaintiff in error in the Court below of Bartholomew vs. Bean, 18 Wall, 635, and National Bank of Kentucky vs. Cooke, 18 N. B. R., 306, and also reported in 13 Bush, 340, are cases of voluntary payments by the bankrupts within the prohibited time and recoveries back of the money or property had from the creditor by the assignee.

The point decided in Bartholomew vs. Bean is that a payment by an insolvent which is void as a preference under the bankrupt act is not excepted from the provisions of said act because the payment was to the holder of a note over due on which was a solvent endorser whose liability was already fixed. There was no question as to the liabilty of the endorser to the holder.

In the Kentucky case the point decided was that when the holder of the bill accepted payment from an insolvent without the endorser's consent, he thereby disabled the endorser from taking any steps to indemnify himself by proceeding against the drawer or payee of the bill and the endorser was therefore released.

They are all cases where the debts have been actually paid and extinguished, and in the cases above cited from the English Courts and from Iowa, it was held that the debt was revived upon the payment being decreed a fraudulent preference and the surety held liable.

In the case at bar, the Bank recovered a judgment against the bankrupts and issued execution and obtained a levy. These acts did not take away any of the rights of the endorser. It did not prevent him from interfering, taking up the note, as by his contract he was bound to do, and proceeding with the

collection as he thought best. None of the steps, which by law he could take to indemnify himself was he disabled from taking. His right to proceed was not suspended by any act of the Bank. The Bank had only obtained further security which was, and was intended, for the benefit of the endorser as well as the Bank. It was as if the Bank had taken collateral security from the makers of the note, which in the end turned out to be worthless.

The endorser was not injured by it, but might have been benefitted if the proceedings in bankruptcy had not followed so swiftly after the execution and levy.

The difference between the case of a payment and the recovery of judgment, as in this case, is that in the first the debt is paid and all remedies for the collection of it gone for the time, and in the other none of the remedies or rights of the surety are gone or suspended. The endorser was at liberty to act if he pleased and that he did not see fit to take such steps as were open to him for the securing of the debt is not the fault of the Bank and it should not be made to suffer therefor.

An act beneficial or which may be beneficial to the endorser and so calculated may be performed without injuring rights against him.

The Mohawk Bank vs. Van Heron, 17 Wend., 117.
Hale vs. Holmes, 18 John. 28–30.
Lynch vs. Reynolds, 16 John., 41.
Wood vs. Jeff. Co. Bank, 9 Cowen, 194–206.

The bankrupts, personally, are not released from liability to the Bank, it is only their estate in bankruptcy, in case it should be decided that the Bank

can not prove its claim, which is discharged from the liability to the Bank.

The judgment stands good against the bankrupts personally—they can not be discharged, and if discharge is granted it is invalid under the circumstances of this case—so that the plaintiff in error has his recourse to them in any event and whatever property they may have, except that which came to the hands of their assignee, on the happening of the bankruptcy.

Under any circumstances the only damage which the plaintiff in error has sustained is what would have been realized from the estate of the bankrupts in case the debt had been proven.

It is the same as if the Bank had received collateral security from the makers of the note, which was not of the full value of the debt, or had received security for the full amount as it was supposed, and it turned out to be insufficient, and by negligence the Bank had lost some part of that security, that certainly would not release the endorser from the whole debt but only *pro tanto*. He is to be made good for the injury which he may sustain. So here the only injury which he can have sustained is the amount which might have been realized from the Brnkrupt Estate in case the debt had been proved.

This amount it was incumbent on the plaintiff in error to have shown, and as he has failed so to do he has not shown that he has in any way been damnified.

IV.

The Bank did not release the lien, if any, gained by the execution and levy, by consenting to the order making the Sheriff special receiver. It was not calculated to impair any of the rights of the Bank on said property, or the fund arising from the same, or the rights of the plaintiff in error therein.

The order provided that the lien of the judgment should attach to the money arising from the sale by the special receiver, and that the rights of the respective parties should remain as if the order had not been made or property sold. (Page 29.)

The Court in Bankruptcy had jurisdiction to make the order, and such order being made on notice was binding on the Bank, whether consented to or not.

> *Ansonia B. & C. Co. vs. Conners, 103 N. Y., 502–512.*

It was a surrender so far as the Bank could make surrender without injuring the rights of the endorser on the fund, which would enure equally to the benefit of the endorser and the Bank, and being intended and calculated as a benefit for the endorser, he was not released by it.

The section of Bankrupt act 5118, of R. S. of U. S., is a perfect answer to the case of Gardner vs. Oliver Lee Bank, 11 Bar. 558, cited by the counsel for the plaintiff in error in the Court below.

§5118 No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, endorser, surety or otherwise.

V.

The consent to the entry of the order appointing the Sheriff special receiver of the fund was a surrender within the purview of the bankrupt act, and all the cases cited by the plaintiff in error admit that upon surrender the party receiving the preference may prove his debt.

VI.

The judgment should be affirmed with costs and damages under the rule for delay.

The writ of error was granted July 19, 1887. (page 41.) The return to the writ was made October, 4, 1887, and was retained by the plaintiff in error until the 5th of September, 1889, when it was filed in this Court. The record was retained by the plaintiff in error as long as it could be without danger of dismissal, making a delay of two years, at least, and probably more, a mere device to obtain time.

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